92-760

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES P. SHANNON, et ux.,

Petitioners,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES P. SHANNON*
EDITH A. R. SHANNON
CHRISTEN M. SHANNON,
a Minor, by her Father
and Natural Guardian,
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98

QUESTIONS PRESENTED

I. Whether the decision of the Seventh Circuit violated Wisconsin Statute § 45.05(5) and its controlling effect upon this case, when the court failed to recognize facts raised in the court below and lawfully reserved for appeal, ignored well settled principles of contract law and public policy, and unlawfully used waiver to ignore the issue squarely before the court, thereby violating petitioners' constitutional rights.

II. As 29 U.S.C. § 1002(32) relates to the facts of this case, the following questions arise:

(A) Whether the City of West Allis is a political subdivision of the State of Wisconsin as a matter of law.

(B) Whether the decision of the Seventh Circuit violated 29 U.S.C. § 1002(32) when it changed the issue on appeal and inappropriately applied case law to define West Allis Memorial Hospital, Inc. as a political subdivision.

(C) Whether the Seventh Circuit abused its power and violated 29 U.S.C. § 1002(32) when it used case law to redefine the issue on appeal by changing the meaning of agency or instrumentality to that of a political subdivision, and thereby ignored the clear, unambiguous letter of the law, and the issue on appeal.

(D) Whether this misapplication of law by the Seventh Circuit violated the Constitutional rights of petitioners.

III. Whether the failure of the court of appeals to address conflicts created by the abandonment of the alleged court-appointed Guardian ad Litem violated petitioners' Constitutional rights to due process, equal protection, life, liberty, and happiness, and the right to raise their family.

PARTIES TO THE PROCEEDING

Petitioners: JAMES P. SHANNON and EDITH A.R. SHANNON are appearing Pro Se as husband and wife and are residents of Elkhorn, Wisconsin and are United States citizens. CHRISTEN M. SHANNON, a Minor, is appearing Pro Se by her father and natural Guardian, JAMES P. SHANNON. CHRISTEN is a resident of her parents' home in Elkhorn, Wisconsin and is a United States citizen. No Petitioner is an attorney.

Respondents: UNITED SERVICES AUTOMOBILE ASSOCIATION, COMMERCIAL UNION INSURANCE COMPANIES, ESTATE OF STEVEN SCHULTZ, DONNA SCHULTZ, WEST ALLIS MEMORIAL HOSPITAL EMPLOYEE HEALTH PROTECTION PLAN, and STATE OF WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES.*

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* Attorney Harry F. Peck, Christen's alleged Guardian ad Litem, and his wife, Attorney Lynn Carey, did not appear during appeal to the U.S. Court of Appeals for the Seventh Circuit. Since they were not present, they were not named as respondents by Petitioners. However, they have been served notice of this Petition for a Writ of Certiorari, and they were also served notice of Petitioners Pro Se appearance in Case No. 91-2494 by the Clerk of Courts for the Eastern District of Wisconsin, pursuant to the Federal Rules of Appellate Procedure 3(d). [See also Proof of such Notice App. 41, 42. Joint Notice of Appeal by petitioners was authorized by the Seventh Circuit pursuant to Fed. R. App. Proc. 3(b).]

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED (See also Appendix at App. 45)	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	10

I.

THE DECISION OF THE SEVENTH CIRCUIT VIOLATED WISCONSIN STATUTE § 45.05(5) AND ITS CONTROLLING EFFECT UPON THIS CASE, WHEN THE COURTS FAILED TO RECOGNIZE FACTS RAISED IN THE COURT BELOW AND LAWFULLY RESERVED FOR APPEAL, IGNORED WELL SETTLED PRINCIPLES OF CONTRACT LAW AND PUBLIC POLICY, AND UNLAWFULLY USED WAIVER TO IGNORE THE ISSUE SQUARELY BEFORE THE COURT, THEREBY VIOLATING PETITIONERS' CONSTITUTIONAL RIGHTS 10

II.

THE DECISION OF THE SEVENTH CIRCUIT VIOLATED 29 U.S.C. § 1002(32) WHEN IT CHANGED THE ISSUE ON APPEAL AND INAPPROPRIATELY APPLIED CASE LAW TO DEFINE WAMHI AS A POLITICAL SUBDIVISION, WHEN IN FACT, THE CITY OF WEST ALLIS IS A POLITICAL SUBDIVISION OF THE STATE OF WISCONSIN AS A MATTER OF LAW. ADDITIONALLY, THE SEVENTH CIRCUIT ABUSED ITS POWER AND VIOLATED 29 U.S.C. § 1002(32) WHEN IT USED CASE LAW TO REDEFINE THE ISSUE ON APPEAL BY CHANGING THE MEANING OF AGENCY OR INSTRUMENTALITY TO THAT OF A POLITICAL SUBDIVISION, AND THEREBY IGNORED THE CLEAR, UNAMBIGUOUS LETTER OF THE LAW, AND THE ISSUE ON APPEAL. IN SO DOING, THE SEVENTH CIRCUIT IGNORED THE FOUR CORNERS OF THE ISSUE ON APPEAL, AND THEREBY VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONERS 16

III.

THE FAILURE OF THE COURT OF APPEALS TO ADDRESS CONFLICTS CREATED BY THE ABANDONMENT OF THE ALLEGED COURT-APPOINTED GUARDIAN AD LITEM VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, LIFE, LIBERTY, AND HAPPINESS, AND THE RIGHT TO RAISE THEIR FAMILY 24

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

CASES: PAGE

Burlington No. R. Co. v. Okla. Tax Comm'n, 481 U.S. 454 (1987) 21

Burns v. Alcala, 420 U.S. 575 (1975) 20

City of Glendale v. Coquat, 46 Ariz. 478, 52 P.2d 1178 (1935) 13

City of West Allis v. County of Milwaukee, 39 Wis. 2d 356, 159 N.W.2d 36 (1968) 16, 22

Department of Employment v. United States, 385 U.S. 355 (1966) 17

Dole v. Steelworkers, 494 U.S. 26 (1990) 18

Farmers and Merchants Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond, Va., 262 U.S. 649 (1923) 11

Fay v. NOIA, 372 U.S. 391 (1963) 13

Flora v. United States, 357 U.S. 63 (1958) 21

Freytag v. Commissioner, 501 U.S. ____, 115 L. Ed. 2d 764 (1991) 20

Gist v. Johnson-Carey Co., 158 Wis. 188, 147 N.W. 1079 (1914) 12

Harbor Ins. Co. v. Blackwelder, 554 So. 2d 329 (Ala. 1989), *cert. denied*, 495 U.S. 948 (1990) .. 16

Hodgson v. Minnesota, 497 U.S. ____, 111 L. Ed. 2d 344 (1990) 27, 28, 29

Hughes v. Dempsey-Tegeler & Co., Inc., 534 F.2d 156 (1976) 14

Jacobs v. Wisconsin Nat. Life Ins. Co., 156 N.W. 159 (1916) 11

Johnson v. Zerbst, 304 U.S. 458 (1938) 13

Miller v. Ammon, 145 U.S. 421 (1891) 12

Molzof v. United States, 502 U.S. ____, 116 L. Ed. 2d 731 (1992) 20

Mullen v. Coolong, 132 Wis. 2d 440, 393 N.W. 2d 110 (Wis. App. 1986) 12

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) ... 19

Norfolk & W.R. v. Train Dispatchers, 499 U.S. ____, 113 L. Ed. 2d 95 (1991) 11

Ogden v. Saunders, 12 Wheat. 213 (1827) 11

Perrin v. United States, 444 U.S. 37 (1979) 19, 20

Perry v. Milwaukee Bd. of School Directors, 131 Wis. 2d 380, 388 N.W. 2d 638 (Wis. App. 1986) ... 12

Pilot Life Ins. Co. v. Dedeueaux, 41 U.S. 41 (1987) . 18

Rose v. Long Island R.R. Pension Plan, 828 F. 2d 910 (2nd Cir. 1987), *cert denied*, 485 U.S. 936 (1988) 16, 17, 24

Rubin v. United States, 449 U.S. 424 (1981) ... 21

Shannon v. Shannon v. USAA, et al., 965 F.2d 542 (7th Cir. 1992) 6, 16

Shannon v. Shannon, 442 N.W.2d 25 (Wis. 1989) . 5, 6

United States v. Nixon, 418 U.S. 683 (1974) ... 2

United States v. United Mine Workers, 330 U.S. 258 (1947) 22, 23

United States, ex rel. Hoffman v. Quincy, 4 Wall. 535 (1867) 11

United States ex rel. Linde v. Brierley, 437 F.2d 324 (1970) 13

Waskey v. Hammer, 223 U.S. 85 (1912) 12

Wilkinson v. Noland Co., 40 F. Supp. 1009 (1941) . 14

Wisconsin ex rel. Watts v. Combined Community Services Board, 122 Wis. 2d 65, 362 N.W.2d 104 (1985) 26

UNITED STATES CONSTITUTION:

ARTICLE I, Section 10 ..... *passim*, App. 45
ARTICLE VI ..... *passim*, App. 45
AMENDMENT V ..... *passim*, App. 45
AMENDMENT VII ..... *passim*, App. 46
AMENDMENT IX ..... *passim*, App. 46
AMENDMENT X ..... *passim*, App. 46
AMENDMENT XIV ..... *passim*, App. 46

WISCONSIN CONSTITUTION:

ARTICLE I, Section I ..... *passim*, App. 47
ARTICLE I, Section 5 ..... *passim*, App. 47
ARTICLE I, Section 9 ..... *passim*, App. 47
ARTICLE I, Section 12 ..... *passim*, App. 47
ARTICLE I, Section 13 ..... *passim*, App. 48
ARTICLE I, Section 22 ..... *passim*, App. 48
ARTICLE IV, Section 28 ..... *passim*, App. 48
ARTICLE VIII, Section 3 ..... *passim*, App. 48
ARTICLE VIII, Section 4 ..... *passim*, App. 48

STATUTES:

28 U.S.C. § 1254(1) ..... 2, 3, App. 48
28 U.S.C. § 1291 ..... 2, 3, App. 49
28 U.S.C. § 1331 ..... 3, 6, App. 49
28 U.S.C. § 1603(a) ..... 3, 19, App. 49

28 U.S.C. § 1603(b) ..... 3, 19, App. 49
28 U.S.C. § 2101(e) ..... 2, 3, App. 49
29 U.S.C. § 141 et seq. ..... 3, 18, App. 50
29 U.S.C. § 152(2) ..... 3, 17, App. 50
29 U.S.C. § 1002(32) ..... *passim*, App. 50
29 U.S.C. § 1003(b)(1) ..... 3, 18, App. 50
29 U.S.C. § 1132(e) ..... 3, 6, App. 50

Wisconsin Statute § 45.05 ..... *passim*, App. 51
Wisconsin Statute § 67.04 ..... 4, 22, App. 52
Wisconsin Statute § 67.05 ..... 4, 22, App. 53
Wisconsin Statute § 67.12(12) ..... 4, 9, 22, App. 53
Wisconsin Statute § 803.01(3)(a) ..... 4, 25, App. 54
Wisconsin Statute § 807.01 ..... 4, 25, App. 54

FEDERAL RULES:

Fed. R. App. Proc. 3(b) ..... ii, 4, App. 55
Fed. R. App. Proc. 3(d) ..... ii, 4, App. 55
Fed. R. Civ. Proc. 17(c) ..... 4, 25, 26, App. 56
Fed. R. Evid. 201 ..... 4, 7, 16, 22, App. 56

LEGISLATIVE MATERIALS:

H.R.Rep. No. 93-533, 1974 U.S. Code Cong. & Ad. News at 4757 21

OTHER AUTHORITIES:

Black's Law Dictionary, Abridged Sixth Edition . 19
Random House Dictionary of the English Language, Second Edition 19
Internal Revenue Code § 501(c)(3) ..... 9, App. 57

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UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, JAMES P. SHANNON, et ux., respectfully petition this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on June 24, 1992.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit, 965 F.2d 542, was issued on June 24, 1992 and is reprinted in the petitioners' Appendix (hereinafter "App.") at App. 1-21. The judgment of the Court of Appeals was issued on June 24, 1992 and appears at App. 22, 23. A timely Petition for Rehearing and Suggestion for Rehearing *in banc* was denied by the Court of Appeals on July 30, 1992 and appears at App. 24, 25.

The May 31, 1991 final judgment of the United States District Court for the Eastern District of Wisconsin in Case No. 90-C-0255 granting respondent, WEST ALLIS MEMORIAL HOSPITAL EMPLOYEE HEALTH PROTECTION PLAN, hereinafter "PLAN" 's, Motion to Dismiss the case against petitioners appears at App. 26, 27. The May 30, 1991 Order of that court appears at App. 28, 29, 30. The reasons found for the court's Order of May 30, 1991 in Case No. 90-C-0255 are indicated in a partial transcript of the Hearing on Motion for Remand and PLAN's Motion to Dismiss at App. 31-36.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 24, 1992. A timely Petition for Rehearing and Suggestion for Rehearing *in banc* was denied by the Seventh Circuit on July 30, 1992. The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e). The unanimous decision of Supreme Court in *United States v. Nixon*, 418 U.S. 683, 690 (1974) held that:

> "Court of Appeals jurisdiction under 28 U.S.C. 1291 [28 U.S.C.S. 1291] encompasses only 'final decisions of the district courts.' Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this court for consideration if the district court order was final. 28 U.S.C. §1254(1), 2101(e) [28 U.S.C.S. §1254(1), 2101(e)]." [See also App. 3 Footnote 3 for dispositive statement by the Seventh Circuit.]

Jurisdiction of this case, when originally filed on July 15, 1985, was with the Milwaukee County Circuit Court for the State of Wisconsin, as Case No. 674-222, as evidenced in the Record of Case No. 90-C-0255 by docketed

entry number, hereinafter "R" (R.1). The respondent, PLAN, entered that case on January 29, 1990 to assert subrogation and reimbursement claims allegedly due under the terms of the PLAN against petitioners (R.1). Petitioners each answered the PLAN's cross-claims and counterclaims and raised counterclaims against the PLAN (R.1). The PLAN removed Case No. 674-222 to federal court on March 14, 1990, claiming ERISA's grant of federal subject matter jurisdiction under 29 U.S.C. § 1132(e). The court agreed and added federal question jurisdiction under 28 U.S.C. § 1331 by order dated May 30, 1991 (App. 28, 29, 30).

United States District Court entered a final order on May 30, 1991 and dismissed the case on May 31, 1991, granting jurisdiction to the U.S. Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION: ARTICLE I, Section 10; ARTICLE VI, AMENDMENTS V, VII, IX, X, and XIV, hereinafter referred to as "Constitutional rights".

WISCONSIN CONSTITUTION: ARTICLE I, Sections 1, 5, 9, 12, 13, and 22; ARTICLE IV, Section 28; ARTICLE VIII, Sections 3 and 4, hereinafter referred to as "Constitutional rights".

UNITED STATES STATUTES: 28 U.S.C. § 1254(1); 28 U.S.C. § 1291; 28 U.S.C. § 1331; 28 U.S.C. § 1603(a); 28 U.S.C. § 1603(b); 28 U.S.C. § 2101(e); 29 U.S.C. § 141 et seq.; 29 U.S.C. § 152(2); 29 U.S.C. § 1002(32); 29 U.S.C. § 1003(b)(1); 29 U.S.C. § 1132(e).

WISCONSIN STATUTES: § 45.05; § 67.04; § 67.05; § 67.12 (12); § 803.01(3)(a); § 807.01.

FEDERAL RULES: Fed. R. App. Proc. 3(b); Fed. R. App. Proc. 3(d); Fed. R. Civ. Proc. 17(c); Fed. R. Evid. 201.

All of the above appear in petitioners' Appendix pursuant to Rule 14.1(k) of the Rules of Supreme Court (App. 45).

STATEMENT OF THE CASE

On July 1, 1984, petitioner, CHRISTEN M. SHANNON, hereinafter "CHRISTEN", was seriously and tragically injured when she nearly drowned in a lake abutting her parents' home near Elkhorn, Wisconsin. CHRISTEN suffered irreparable extensive brain damage and is a spastic quadriplegic, requiring 24 hour per day life sustaining medically intensive care. CHRISTEN'S airway must be suctioned frequently and she receives chest therapy throughout the day to prevent life threatening pneumonia. She has not been able to speak since her accident and cannot swallow, so she is fed through a gastrostomy tube which passes directly through the wall of her stomach. CHRISTEN is cognitive and responds to her family and care givers in various ways. She is not in a coma, nor in a persistent vegetative state. Loving care has been provided for CHRISTEN in her parents' home since December 8, 1984. The annual cost of CHRISTEN's care has approached $350,000.00 per year. Medical assistance TITLE XIX is presently paying approximately $250,000.00 per year. Total cost of care exceeds $2,000,000.00 since CHRISTEN'S accident in 1984.

At the time of the accident, CHRISTEN'S parents, petitioners, JAMES P. and EDITH A.R. SHANNON, were

sitting in their boat which was docked at their pier. CHRISTEN had been playing in the SHANNON'S yard and went over to the adjoining property owned by the respondents, SCHULTZES. The SCHULTZES were entertaining guests on their outdoor patio located on the lakeshore and when CHRISTEN went over to the SCHULTZES' property, petitioner, JAMES P. SHANNON, called CHRISTEN home. Respondent, DONNA SCHULTZ, stated "It's okay, she's not hurting anything, she'll be all right" [See *Shannon v. Shannon*, 442 N.W.2d 25 (Wis. 1989)]. After approximately five minutes, petitioner, JAMES P. SHANNON, could not see CHRISTEN, and a search ensued. Approximately fifteen minutes later, CHRISTEN was found in the water near the end of SCHULTZES' pier, not breathing and her heart had stopped beating. Petitioners, SHANNONS, suggest that a review of the entire record affecting this case is warranted because of the circuitous complexity created by all litigation since CHRISTEN's accident.

Petitioner, EDITH A.R. SHANNON, was employed by respondent, WEST ALLIS MEMORIAL HOSPITAL, INC., and was covered by the PLAN. CHRISTEN'S medical expenses were initially borne by the PLAN. The PLAN denied liability for CHRISTEN'S care in September of 1987, but on October 2, 1987, was ordered by the state court in Case No. 755-726 to continue payment of CHRISTEN'S medically necessary care, as contractually required by the PLAN. That case was thereafter removed by the PLAN to federal court and became Case No. 87-C-1206. On October 28, 1989, in Case No. 87-C-1206, CHRISTEN lost her health care after the PLAN amended itself on January 1, 1989 to exclude care for CHRISTEN by creating "The Christen Shannon Plan". The court chose to rely on this new plan, rather than the PLAN

of 1984. Up to that date, the PLAN had paid approximately $1.3 Million for CHRISTEN'S care.

On January 29, 1990, the PLAN entered lower court Case No. 674-222, asserting subrogation and reimbursement claims claimed due against the petitioners, whom they insured, under the now modified subrogation terms of the PLAN (R.1, Exh.B). Petitioners each answered the PLAN's Cross-Claims and Counterclaims and raised Counterclaims against The PLAN (R.1). The PLAN removed Case No. 674-222 to federal court on March 14, 1990, claiming ERISA's grant of federal subject matter jurisdiction under 29 U.S.C. § 1132(e) (R.1). The court later agreed and added federal question jurisdiction under 28 U.S.C. § 1331 by Order dated May 30, 1991, and dismissed the case by Order dated May 31, 1991.

However, the federal court had remanded the personal injury claims back to state court by stipulation of all parties on January 31, 1991 (R.20-26). Case No. 674-222 was settled after remand of Case No. 90-C-255 by Order of the state court dated October 3, 1991, upon the recommendation of all respondents and CHRISTEN's Guardian ad Litem, in spite of the strenuous objection of all three petitioners. A part of that agreement included a dismissal of Case No. 87-C-1206 and 90-C-255 by CHRISTEN's alleged Guardian ad Litem. This Order has been appealed by all petitioners and is presently in the Wisconsin Court of Appeals as Case No. 91-2456. Additional statements and legal conclusions of the law of this case can be found in *Shannon v. Shannon*, 442 N.W.2d 25 (Wis. 1989), and *Shannon v. USAA*, 965 Fed. 2d 542 (7th 1992).

Petitioners' Writ of Certiorari to this Supreme Court involves complicated issues of law and fact. The relevant facts, which remain undisputed by either lower court were

contained in Petitioners' Brief in Support of Motion for Remand in Case No. 90-C-0255 (R.9) in the Affidavit of JAMES P. SHANNON and in petitioners' Seventh Circuit Appellate Brief. These facts all appeared subject to judicial notice under Rule 201 of the Federal Rules of Evidence, as previously noted in both courts below, and are as follows:

1. The hospital operation now conducted by WEST ALLIS MEMORIAL HOSPITAL, INC. (hereinafter "WAMHI"), a non-profit corporation, was formerly conducted by the City of West Allis (R. 9 Appendix D, First Recital).

2. The City of West Allis utilized its city attorney to undertake all work necessary to constitute WAMHI, pursuant to authority (R. 9 Appendix A).

3. The City of West Allis constituted the Board of Directors of WAMHI (R. 9 Appendix C).

4. The hospital facility itself, WEST ALLIS MEMORIAL HOSPITAL (hereinafter "WAMH") is owned by the City of West Allis. It is leased to a non-profit service corporation, WAMHI, which has responsibility for the management of the institution (R. 9 Appendix D).

5. The City of West Allis leased WAMH to WAMHI based upon a resolution reciting such action as being in the best interests of the City of West Allis (R. 9 Appendix D, Cover Resolution).

6. The lease of WAMH to WAMHI is subject to numerous requirements to operate the facilities for the benefit of the City of West Allis (R. 9 Appendix D, par. A of the Lease).

7. The operation of WAMH by WAMHI may not inure to the benefit of any private individual (R. 9 Appendix D, par. A(1)(b)).

8. All funds from the operation of WAMH which are not needed are turned over to the City of West Allis. The City and hospital officials meet to determine what funds are to be turned over to the City. The purpose of the meeting is so . . . "that the City may be fully advised prior to passage of its annual budget for City operations for the succeeding year." (R.9 Appendix D, par. A(12)).

9. The Lease requires that all WAMH funds held by the City of West Allis were turned over to WAMHI at the commencement of the operation of WAMHI (R.9 Appendix D, par. B(3)).

10. All the board members of WAMHI must be residents of or have business interests in the City of West Allis and the Comptroller of the City of West Allis shall be a board member of WAHMI (R.9 Appendix D, par. B(7)).

11. On one occasion, when the Board of Directors could not function in a meaningful way, the common council of the City of West Allis was asked to reconstitute the Board of WAMHI (R.9 Appendix E).

12. The purposes of WAMH in any expansion are served by a request from WAMHI to the City of West Allis to borrow money for WAMH (R.9 Appendix F).

13. The City of West Allis responds to requests from WAMHI by authorizing the issuance of general obligation indebtedness (R.9 Appendix G).

14. The general obligation indebtedness of city taxpayers is issued for WAMHI as a city owned hospital

operated by a 501(c)(3) organization (R.9 Appendix H, p. 1). The basic benefit of such obligations is the tax exempt nature of the obligation. This appendix also notes the Notes evidencing indebtedness are issued pursuant to § 67.12(12), Wis. Stats. (R.9 Appendix H, p. 1).

15. The audited statements of the City of West Allis show WAMH and WAMHI as an asset (R.9 Appendix I and J).

16. The hospital is shown as being leased from the City of West Allis without any provision for lease payments (R.9 Appendix I, p. 7).

17. "Upon the expiration or termination of the lease, Memorial [WAMHI] agrees to transfer and assign all of its corporate assets and liabilities to the City." (R.9 Appendix D, par. B(12), p. 6).

18. Appellants believe the entire R.9 Appendix contains numerous other facts on the record which were not in dispute and unquestionably evidenced that WAMHI was an agency and instrumentality of the City of West Allis (R.9).

19. "This lease shall become effective immediately upon the execution hereof by the duly authorized officers of Memorial and of the City and shall extend for a term of (50) years from the date hereof." (R.9 Appendix D, par. B(13), p. 6).

20. The purpose for which WAMHI was organized was done pursuant to § 45.05, Wis. Stats. (R.9 Appendix B, Article IIA).

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE SEVENTH CIRCUIT VIOLATED WISCONSIN STATUTE § 45.05(5) AND ITS CONTROLLING EFFECT UPON THIS CASE,WHEN THE COURTS FAILED TO RECOGNIZE FACTS RAISED IN THE COURT BELOW AND LAWFULLY RESERVED FOR APPEAL, IGNORED WELL SETTLED PRINCIPLES OF CONTRACT LAW AND PUBLIC POLICY, AND UNLAWFULLY USED WAIVER TO IGNORE THE ISSUE SQUARELY BEFORE THE COURT, THEREBY VIOLATING PETITIONERS' CONSTITUTIONAL RIGHTS.

The decision of the Seventh Circuit is in direct conflict with numerous, applicable decisions of this Court and other state courts of last resort, as argued hereafter, and has departed so far from accepted judicial proceedings, that certiorari should be granted.

The Lease of WAMH was officially executed on May 29, 1963 (See R.9, App. D, p. 7). Wisconsin Statute § 45.05(5) (App. 52) specifically limits the term of a contractual lease of a municipal memorial to 25 years (App. 52). It is beyond question that contractually controlling law of the State of Wisconsin was in existence at the writing of the Lease, and is still the law governing the Lease to this very day. (See App. 51, 1961, 1963, 1989-1990). The Seventh Circuit ignored and violated this law by claiming that petitioners waived their right to rely upon that law (App. 15). However, the law and/or public policy of the State of Wisconsin cannot be waived.

This Supreme Court recently reaffirmed long settled principles of law, which mandate the controlling effect that § 45.05(5), Wis. Stats., has on the Constitutionally appropriate determination of this case. In *Norfolk & W.R. v.*

Train Dispatchers, 499 U.S. ____, 113 L. Ed. 2d 95, 111 S. Ct. 1156 (1991), this Supreme Court states:

> " 'The obligation of a contract is "the law which binds the parties to perform their agreement.' " *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429, 78 L Ed 413, 54 S Ct 231 (1934) (quoting *Sturges v. Crowninshield*, 4 Wheat 122, 197, 4 L Ed 529 (1819)). A contract depends on a regime of common and statutory law for its effectiveness and enforcement.
>
> 'Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.' *Farmers and Merchants Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond, Va.*, 262 US 649, 660, 67 L Ed 1157, 43 S Ct 651, 30 ALR 635 (1923).
>
> A contract has no legal force apart from the law that acknowledges its binding character."

See also *Ogden v. Saunders*, 12 Wheat. 213, 231 (1827); *United States, ex rel. Hoffman v. Quincy*, 4 Wall. 535, 550 (1867).

The uncontroverted fact is that WAMHI was incorporated under § 45.05, Wis. Stats. (R.9, App. A, Articles of Incorporation p. 1). The exact fact is that a lease was written by the City of West Allis (R.9, App. D, p.6) for WAMH for a term of 50 years, which is in direct violation of Wisconsin Statute § 45.05(5). The Wisconsin Supreme Court has held in *Jacobs v. Wisconsin Nat. Life Ins. Co.*, 156 N.W. 159, 160 (1916) that:

> "[2-4] A contract is not to be condemned merely because it is ingenious (*Govier v. Brechler*, 159 Wis. 157,

> 161, N.W. 740), nor unless it contravenes some rule of positive law or conflicts with public policy. *Shepard v. Pabst*, 149 Wis. 35, 45, 135 N.W. 158."

See also *Mullen v. Coolong*, 132 Wis. 2d 440, 393 N.W. 2d 110, 116 (Wis. App. 1986). Additionally, this Supreme Court has held in *Miller v. Ammon*, 145 U.S. 421, 426 (1891) that:

> "The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock, Principles of Contracts, pp. 253, 260; *Penn v. Bornman*, 102 Ill. 523; *Alexander v. O'Donnell*, 12 Kan. 608; *Gunter v. Leckey*, 30 Ala. 591; *Kennedy v. Cochrane*, 65 Me. 594; *Bank of United States v. Owens*, 27 U.S. 2 Pet. 527, 539 [7: 508, 512]; *Pangborn v. Westlake*, 36 Iowa, 546, 549; *Harris v. Runnels*, 53 U.S. 12 How. 79, 84 [13: 901, 903]. In *Bank of United States v. Owens*, this court said: 'There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.' "

The Wisconsin Court of Appeals has also reiterated pertinent Supreme Court decisions which rely upon the reasoning found in *Miller v. Ammon*, *supra*, when it stated in *Perry v. Milwaukee Bd. of School Directors*, 131 Wis. 2d 380, 388 N.W. 2d 638, 640 (Wis. App. 1986):

> "Generally, a contract made in violation of a statute is void. See *Waskey v. Hammer*, 223 U.S. 85, 94, 32 S.Ct. 187-189, 56 L.Ed. 359 (1912). A void contract cannot be ratified. See *Gist v. Johnson-Carey Co.*, 158 Wis. 188, 194, 147 N.W. 1079, 1081 (1914)."

On May 29, 1988, the Lease of WAMH to WAMHI expired as a matter of law under § 45.05(5), Wis. Stats. That issue was raised squarely to the district court by the at-

torney for petitioners in their "Brief in Support of Motion for Remand" (R.9, p.8), and again directly to the Seventh Circuit by Brief of Petitioners at page 25. Both courts failed to apply the law to the undisputed facts of this case, with the Seventh Circuit relying exclusively on waiver as its justification for ignoring the error below and the law on appeal as it directly applies to the facts of this case.

This Supreme Court has issued a classic definition of waiver in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 (1938) as follows:

> " 'an intentional relinquishment or abandonment of a known right or privilege' Quoted from *Fay v. NOIA*, 372 U.S. 391, 439, 9 L. Ed. 2d 837, 83 S.Ct. 822 (1963)."
>
> Additionally, "[a] waiver under that standard consists of 'an intentional relinquishment or abandonment of a know[n] right or privilege,' and every presumption against waiver is to be indulged." See *United States ex rel. Linde v. Brierley*, 437 F. 2d 324 (1970)."

As was stated by the Supreme Court of Arizona in the case of *City of Glendale v. Coquat*, 46 Ariz. 478, 52 P.2d 1178, 1180 (1935):

> "It is apparently universally held that where a right has been given to an individual not alone for his private benefit but, as a matter of public policy, in the interest of the state, it may not be waived by anyone. *Day v. McAllister*, 15 Gray (Mass.) 433; *Clark v. Spencer*, 14 Kan. 398, 19 Am. Rep. 96; *State v. Carman*, 63 Iowa, 130, 18 N.W. 691, 50 Am. Rep. 741; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Bosler v. Rheem*, 72 Pa. 54; *Branch v. Tomlinson*, 77 N.C. 388; *Clark v. State*, 142 N.Y. 101, 36 N.E. 817; *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037; *Cato v. Grendel Cotton Mills*, 132 S.C. 454, 129 S.E. 203, 41

> A.L.R. 439. As was said by the New York Court of Appeals, in *Wright v. State*, 223 N.Y. 44, 119 N.E. 83, 85, 'Such conclusion would permit an officer of the state to defeat the beneficent purpose of the statute and violate its provisions.' "

See also *Hughes v. Dempsey-Tegeler & Co., Inc.*, 534 F.2d 156, 180 (1976), and *Wilkinson v. Noland Co.*, 40 F. Supp. 1009, 1013 (1941).

Wisconsin Statute § 45.05(5) is the public policy of the State of Wisconsin as it controls the lawful conduct of county and municipal memorials. As such, the petitioners are not alone in their receipt of benefits concurred by that statute and therefore, as a matter of law, Wisconsin Statute § 45.05(5) cannot be waived by anyone, especially WAMHI and the court. Petitioners did not waive the issue and cannot waive the law. The law is the law. The contract is void as a matter of law, and that determination under all the relevant decisions of this Supreme Court cited herein, is the only possible, lawful conclusion that the court could have made.

Petitioners contend that the decision of the court to waive the law was done with knowledge of the consequences to all parties. If the Seventh Circuit had found as a matter of law that the Lease of WAMH to WAMHI expired on May 29, 1988, then petitioners would have secured life-care for their grievously injured daughter. By applying the terms of the Lease, the City of West Allis would have acquired the liability for her care for life under the terms of the 1984 PLAN (R.9, App. D, par. (B) (12) and R.1, Exh.B). Furthermore, minor settlement in Case No. 674-222, would have been nullified due to remand of the petitioners' claim against the City of West Allis, and because the City of West Allis, and not the PLAN, would have had whatever rights of subrogation

the PLAN contended to have had under its terms. Petitioners' Cross-Complaints (R.1, Exh.C,D, and R.16, App.I) would have been appropriately preserved by state law and the City of West Allis would have been liable for CHRISTEN's life-care costs. Thus, securing petitioners' Constitutional rights.

As this case presently stands, however, the court clearly abused its power and violated petitioners' Constitutional rights to life, liberty, and property, their right to equal protection, their right to due process, and interfered with their right to raise their family as they see fit. This Supreme Court cannot condone the court's ignoring well-settled principles of law, and idly stand by and allow the unlawful use of waiver to ratify the court's own denial of facts raised and reserved for appeal as they related to the law, thus permitting multiple violations of the petitioners' rights. This issue alone, represents such a gross departure from the law and the petitioners' rights on appeal, that review by this Supreme Court is warranted.

An additional Constitutional conflict occurs in this case due to the failure of the federal court to give full consideration to the law of the State of Wisconsin as required by AMENDMENT X of the United States Constitution, when the court waived state law and refused to apply the law as set forth in § 45.05(5), Wis. Stats.

II.

THE DECISION OF THE SEVENTH CIRCUIT VIOLATED 29 U.S.C. § 1002(32) WHEN IT CHANGED THE ISSUE ON APPEAL AND INAPPROPRIATELY APPLIED CASE LAW TO DEFINE WAMHI AS A POLITICAL SUBDIVISION, WHEN IN FACT, THE CITY OF WEST ALLIS IS A POLITICAL SUBDIVISION OF THE STATE OF WISCONSIN AS A MATTER OF LAW. ADDITIONALLY, THE SEVENTH CIRCUIT ABUSED ITS POWER AND VIOLATED 29 U.S.C. § 1002(32) WHEN IT USED CASE LAW TO REDEFINE THE ISSUE ON APPEAL BY CHANGING THE MEANING OF AGENCY OR INSTRUMENTALITY TO THAT OF A POLITICAL SUBDIVISION, AND THEREBY IGNORED THE CLEAR, UNAMBIGUOUS LETTER OF THE LAW, AND THE ISSUE ON APPEAL. IN SO DOING, THE SEVENTH CIRCUIT IGNORED THE FOUR CORNERS OF THE ISSUE ON APPEAL, AND THEREBY VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONERS.

Grant of certiorari in this case will establish an appropriate definition for the courts to follow when applying the governmental exception statutes to ERISA law as written. Furthermore, certiorari is warranted in this case because *Shannon v. Shannon v. USAA, et al.*, 965 F.2d 542 (7th Cir. 1992), is now absolutely in direct conflict with *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2nd Cir. 1987), *cert denied*, 485 U.S. 936, 99 L.Ed. 2d 273, 108 S. Ct. 112 (1988), with *Harbor Ins. Co. v. Blackwelder*, 554 So.2d 329, 332, 333 (Ala. 1989), *cert denied*, 495 U.S. 948, 109 L. Ed. 2d 535, 110 S. Ct. 2209 (1990), and with numerous Supreme Court maxims herein.

The question raised on appeal to the Seventh Circuit was a mixed question of fact and law. Those undisputed facts, as previously stated by petitioners herein, were also subject to judicial notice under Rule 201 of the Federal Rules of Evidence. See *City of West Allis v. County of*

Milwaukee, 39 Wis. 2d 356, 159 N.W.2d 36 (1968), adjudicative fact. What is, however, in dispute is the impact those facts have on determining whether WAMHI is an agency or instrumentality of the City of West Allis, and whether Congress did, by intent, exempt governmental plans as defined by 29 USC § 1002(32).

The court speciously failed to focus on the issue on appeal in this case (App. 6). The issue is not whether WAMHI is a political subdivision of the State of Wisconsin, but rather, whether WAMHI is an agency or instrumentality of the political subdivision of the State of Wisconsin, namely, the City of West Allis. That issue (App. 6, par. 2 "The focus . . .") was squarely raised to the courts below on page 19 of the petitioners' Brief to the Seventh Circuit and in the district court (see App. 32 [20] and R.9, p.10). The court then speciously and unlawfully changed the issue to make the determination that WAMHI was not a political subdivision (App. 6, footnote 6).

Petitioners point out for this Supreme Court, that every single case cited by the Seventh Circuit in their decision, except *Rose v. Long Island R.R. Pension Plan*, *supra*, and *Department of Employment v. United States*, 385 U.S. 355 (1966), relied upon labor law to define a political subdivision as used within 29 U.S.C. § 152(2). Petitioners respectfully request the Supreme Court to closely read every case cited by the Seventh Circuit in its decision, especially *Rose v. Long Island R.R. Pension Plan*, *supra*. The *Rose* case did, in fact, rule on a potentially relevant definition of an agency or instrumentality as found in 29 U.S.C. § 1002(32), but that definition was not relied upon by the lower court and was ignored by the Seventh Circuit. That court repeatedly and speciously misrepresented the scope of those decisions as including a determination

of agency and instrumentality. That constitutes reversible error and a denial of due process to petitioners, leading to a denial of their Constitutional rights to equal protection and life, liberty, and happiness.

29 U.S.C. § 1003(b) states that the provisions of this title shall not apply to any employee benefit plan if (1) such plan is a governmental plan as defined in section 3(32) [29 USC § 1002(32)], the law does not say as defined by 29 U.S.C. § 141 et seq., as relied upon by the Seventh Circuit in ruling on page 9 of their decision (App. 9). Each case relied upon by the Seventh Circuit was a case involving interpretation of labor law under 29 USC § 141 et seq., except *Rose v. Long Island R.R. Pension Plan, supra*, which the Seventh Circuit ignored. In *Pilot Life Ins. Co. v. Dedeueaux*, 41 U.S. 41, 51, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987), the Supreme Court said:

> " ' " '[i]n expounding a statue, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " ' " *Kelly v. Robinson*, 479 US 36, 43, 93 L Ed 2d 216, 107 S Ct 353 (1986), quoting *Offshore Logistics, Inc. v. Tallentire*, 477 US 207, 221, 91 L Ed 2d 174, 106 S Ct 2485 (1986) (quoting *Mastro Plastics Corp. v. NLRB*, 350 US 270, 285, 100 L Ed 309, 76 S Ct 349 (1956) (in turn quoting *United States v. Heirs of Boisdore*, 8 How 113, 122, 12 L Ed 1009 (1849))).

In *Dole v. Steelworkers*, 494 U.S. 26, 55, 108 L. Ed. 2d 23, 110 S. Ct. 929 (1990), this Supreme Court stated:

> " 'On a pure question of statutory construction, our first job is to try to determine congressional intent, using traditional tools of statutory construction." *NLRB v. Food and Commercial Workers*, 484 US 112, 123, 98 L Ed 2d 429, 108 S Ct 413 (1987). Our "starting point is the language of the statute,' *Schrei-*

> *ber v. Burlington Northern, Inc.*, 472 US 1, 5, 86 L Ed 2d 1, 105 S Ct 2458 (1985), but "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Massachusetts v. Morash*, 490 US 107, 115, 104 L Ed 2d 98, 109 S Ct 1668 (1989), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 51, 95 L Ed 2d 39, 107 S Ct 1549 (1987). See also *K mart Corp. v. Cartier, Inc.*, 486 US 281, 291, 100 L Ed 2d 313, 108 S Ct 1811 (1988) (same)."

Petitioners diligently provided the lower court with appropriate common law definitions of agency and instrumentality (R.9, p. 10, R.16, p. 7). Further, Black's Law Dictionary, Abridged Sixth Edition, defines instrumentality as "[s]omething by which an end is achieved; a means, medium, agency", and Random House Dictionary of the English Language, Second Edition, defines it as "[2] the fact or function of serving some purpose; [3] a means or agency". Nowhere does ERISA define either instrumentality or agency and therefore, the court below was charged with an obligation of giving those terms their accumulated meaning under either equity by their common usage, or the common law meaning as may be defined elsewhere, i.e., 28 U.S.C. § 1603(a) and (b) (App. 49), and held in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 69 L. Ed. 2d 672, 101 S. Ct. 2789 (1981) as follows:

> "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. See *Perrin v. United States*, 444 US 37, 42-43, 62 L Ed 2d 199, 100 S Ct 311 [1979]."

In *Burns v. Alcala*, 420 U.S. 575, 580, 581, 43 L. Ed. 2d 469, 95 S. Ct. 1180 (1975), this Supreme Court adhered to the following axiom:

> ". . . that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons [420 US 581] to the contrary, *Banks v. Chicago Grain Trimmers*, 390 US 459, 465, 20 L Ed 2d 30, 88 S Ct 1140 (1968); *Minor v. Mechanics Bank of Alexandria*, 1 Pet 46, 64, 7 L Ed 47 (1828)."

"A fundamental cannon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Burns v. Alcala*, *supra*, quoting from *Perrins v. United States*, *supra*.

This Supreme Court has also recently held in *Molzof v. United States*, 502 US ____, 116 L. Ed 2d. 731, 740, 112 S. Ct. ____ (1992) that:

> "A cardinal rule of statutory construction holds that:
>
> '[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.' *Morissette v. United States*, 342 US 246, 263, 96 L Ed 288, 72 S Ct 240 (1952)."

This Supreme Court also has held in *Freytag v. Commissioner*, 501 U.S. ____, 115 L. Ed. 2d 764, 776, 111 S. Ct. ____ (1991), that:

> "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and

> exceptional circumstances. *Demarest v. Manspeaker*, ____ US ____, ____, 112 L Ed 2d 608, 111 S Ct 599 (1991)."

This Supreme Court went on to state in *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981):

> "When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.' " *TVA v. Hill*, 437 US 153, 187, n 33, 57 L Ed 2d 117, 98 S Ct 2279 (1978) (quoting *Crooks v. Harrelson*, 282 US 55, 60, 75 L Ed 156, 51 S Ct 49 (1930)). Accord, *Aaron v. SEC*, 446 US 680, 695, 64 L Ed 2d 611, 100 S Ct 1945 (1980); *Ernst & Ernst v. Hochfelder*, supra, at 214, n 33, [425 US 185] 47 L Ed 2d 668, 96 S Ct 1375 [1976]."

See also *Burlington No. R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461, 95 L. Ed. 2d 404, 107 S. Ct. 1855 (1987) and *Flora v. United States*, 357 U.S. 63, 65, 2 L. Ed. 2d 1165, 78 S. Ct. 1079 (1958).

ERISA defines a "governmental plan" as found in 29 U.S.C. § 1002(32) (App. 50). The law is the law, and it says "or by any agency or instrumentality of any of the foregoing". 29 U.S.C. § 1002(32). Not only did the decision of the Seventh Circuit ignore the law, but they failed to give the unambiguous statutory words their ordinary meaning, as required by this Supreme Court. Petitioners' repeated request to apply the ordinary meaning of the words was ignored by the courts below. This gross departure from established maxims of law by the courts below, violates not only the law itself, but the absolute intent of Congress to exclude governmental plans as defined by ERISA. H.R.Rep. No. 93-533, 1974 U.S. Code Cong. & Ad. News at 4757 specifically states:

> "[u]nder the bill, government plans are plans established and maintained for their employees by the United States Government, or by the government of any State or political subdivision of a State, or by any agency or instrumentality of such governments."

The facts of this case, under the above Supreme Court maxims of law, and the unambiguous terms found in 29 U.S.C. § 1002(32), indicate that WAMHI is absolutely an agency or instrumentality of the City of West Allis as those words are commonly used and defined. The court erred when it speciously defined WAMHI as a "political subdivision" of the State of Wisconsin. It should have applied the two-pronged test to the City of West Allis, Wisconsin, which meets that test. Furthermore, it is a political subdivision of the State of Wisconsin as a matter of law (R.9, App. A,C,D,G,H, and I), and as an adjudicated fact under the Federal Rules of Evidence 201, and Wisconsin Statutes §§ 45.05, 67.04, 67.05, and 67.12(12). Also see *City of West Allis v. Milwaukee County, supra.* The misapplication of the law and of maxims of law to the facts of this case is difficult for petitioners to accept as being simply judicial error. The Seventh Circuit very craftily chose to speciously change the issues raised by petitioners on appeal to rule in an obviously predisposed opinion. Justice Rutledge wrote in his dissenting opinion in *United States v. United Mine Workers*, 330 U.S. 258, 342, 343 (1947):

> "This case became a cause celebre the moment it began. No good purpose can be served by ignoring that obvious fact. But it cannot affect our judgment save only perhaps to steel us, if that were necessary, to the essential and accustomed behavior of judges.[1] In all cases great or small this must be to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it.

> No man or group is above the law. Nor is any beyond its protection. *Re Yamashita*, 327 US 1, dissenting opinion, 41, 90 L ed 499, 523, 66 S Ct 340. These truths apply equally to the Government. When its power is exerted against the citizen or another in the nation's courts, those tribunals stand not as partisans, but as independent and impartial arbiters to see that the balance between power and right is held even. In discharging that high function the courts themselves, like the parties, are subject to the law's majestic limitations. We are not free to decide this case, or any, otherwise than as in conscience we are enabled to see what the law commands."
>
> "Footnote 1: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Holmes, J., dissenting, in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401, 48 L.Ed. 679, 726, 24 S.Ct. 436.
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> . . .
>
> 'At times,' he wrote, 'in our system the way in which the courts perform their function becomes as important as what they do in the result. In some aspects, matters of procedure constitute the very essence of ordered liberty under the Constitution.' *United States v. United Mine Workers*, 330 U.S. 258, 363 (1947)."

Our judicial system of adversarial representation has become the means by which due process is carried out. An appeal involves judgment and persuasion. It is the exercise of the court's judgment and the lawyer's effort to persuade the court to rule in his client's favor. In this case, both sides put forth a standard for determining

whether or not WAMHI was an instrumentality or agency of the City of West Allis. The court chose neither standard and then changed the issue on appeal to adopt an irrelevant standard. Petitioners argue that they were denied due process and other Constitutional rights, because they were never afforded an opportunity to present and argue the law relative to the erroneous issue and law adopted by the court, as opposed to the real issue on appeal.

Furthermore, if the Seventh Circuit did read *Rose v. Long Island R.R. Pension Plan*, *supra*, at page 98, they would have found precedent to use in deciding whether WAMHI was an agency or instrumentality as required by 29 U.S.C. § 1002(32), and would have known their decision was in conflict with *Rose*. Petitioners argue that the court below overstepped their mandate to remain independent and impartial arbiters, so the balance of power and right was not held even.

III.

THE FAILURE OF THE COURT OF APPEALS TO ADDRESS CONFLICTS CREATED BY THE ABANDONMENT OF THE ALLEGED COURT-APPOINTED GUARDIAN AD LITEM VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, LIFE, LIBERTY, AND HAPPINESS, AND THE RIGHT TO RAISE THEIR FAMILY.

This case involves the contractual rights of the petitioners to receive medical benefits from the PLAN, and legal rights of recovery of damages under tort law. Petitioners' rights and interests to receive those benefits and legal recovery of damages under tort law have always been exactly aligned. There is not now, nor ever has been, a need for CHRISTEN to have a court-appointed guardian

ad litem to protect her interests as they relate to The PLAN. Petitioners have avidly pursued their rights, as well as CHRISTEN's, and under Wisconsin Statute § 803.01(3)(a), CHRISTEN's parents, as her guardians, can and did appear by counsel, and under Fed. R. Civ. Proc. 17(c), petitioner, JAMES P. SHANNON, was authorized by law to . . . "sue or defend on behalf of the infant or incompetent person".

The unnecessary alleged appointment of that Guardian ad Litem, his conduct in procuring that alleged appointment, and then abandoning that responsibility, should shock this Court. Petitioners argue that under the circumstances of this case, they have been denied their Constitutional rights and the right to raise their family, because the alleged Guardian ad Litem bartered away their ability to make life sustaining decisions for CHRISTEN, independent of the governmental regulations imposed by Medicaid law, when he abandoned this case to settle Case No. 674-222, presently on appeal. When the alleged Guardian ad Litem decided to settle Case No. 674-222, the petitioners were denied the right to a jury trial and potential recovery from respondent SCHULTZES and their insurers. Under Wisconsin Statute § 807.01, with statutory interest, that potential exceeds $9 Million.

Footnote 9 (App. 20, 21) of the decision of the Seventh Circuit Court of Appeals is unconstitutionally specious and raises issues of first impression for determination by this Supreme Court. Certiorari is warranted because the facts related to the failure of the Guardian ad Litem to appear were well known by the Seventh Circuit, and because the alleged Guardian ad Litem, as the direct representative of the court, caused the court itself, as a matter of law, to deny petitioners their Constitutional rights. Additionally, the petitioners' Constitutional rights were violated by

the failure of the court to recognize the binding effect that the petitioners' lawful appearance, under Fed. R. Civ. Proc. 17(c) on behalf of CHRISTEN, had on all parties, including the alleged Guardian ad Litem.

On brief to the Court of Appeals, petitioners gave full disclosure to the Seventh Circuit of the existence of the Guardian ad Litem, ATTORNEY HARRY F. PECK (See Certificate of Interest at App. 37, 38). Further notice of the blatant misconduct of the Guardian ad Litem, a guardian by estoppel, was provided to all parties and the Seventh Circuit Court of Appeals by copy of petitioners' letter to WAMHI counsel, Quarles & Brady, (See App. 39-44), and by copy of petitioners' letter to HONORABLE J.P. STADTMUELLER dated November 7, 1991, with attachments. Furthermore, the Guardian ad Litem himself notified the Seventh Circuit on July 2, 1991, that he felt the appeal was "not well grounded and is not in the minor plaintiff's best interests" (App. 41, 42). The Brief of respondent PLAN also objected to the petitioners' appearance on behalf of their daughter, and petitioners' Reply Brief to the Seventh Circuit at page 13, raised the above issues directly to the court, issues directly affecting CHRISTEN M. SHANNON's Constitutional rights to due process, equal protection, and life, liberty, and happiness. As recognized by the Seventh Circuit at Footnote 9, " 'the guardian must be present at all hearings . . . if the ward does not have full legal counsel.' *Wisconsin ex rel. Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985)." Admittedly, the Seventh Circuit did not compel the Guardian ad Litem to show cause as to why he would not appear, and had abandoned his client as proven by his letter (App. 43, 44).

The abandonment of CHRISTEN by her alleged Guardian ad Litem is precisely the fact at issue here, since that

issue should have been decided by the court, which in turn, created problems for the court by the failure of the alleged Guardian ad Litem to appear. The Seventh Circuit violated the Constitutional rights of petitioners when it failed to address this very difficult question of first impression before this Court.

Petitioners' actions unquestionably find support in their Constitutional rights and their penumbra right to raise their family. Extensive recitation of this Supreme Court's opinions relating to petitioners' penumbra rights can be found in *Hodgson v. Minnesota*, 497 U.S. ____, 111 L. Ed. 2d 344, 367-369, 110 S. Ct. ____ (1990):

> "Parents have an interest in controlling the education and upbringing of their children but that interest is a "counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 US 248, 257 (1983) . . . The fact of biological parentage generally offers a person only "an opportunity . . . to develop a relationship with his offspring." *Lehr*, 463 US, at 262 . . . But the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest. See *Stanley v. Illinois*, 405 US 645, 651 (1972).
>
> . . .
>
> [T]he family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference. See *Wisconsin v. Yoder*, 406 US 205, 233-234 (1972);
>
> . . .
>
> The family may assign one parent to guide the children's education and the other to look after their health. The statist notion that governmental power should supersede parental authority in *all* cases

because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 US [584 (1979], at 603, 61 L Ed 2d 101, 99 S Ct 2493. We have long held that there exists a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 US [158 (1944)], at 166, 88 L Ed 645, 64 S Ct 438. Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the "governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore v. East Cleveland*, 431 US 494, 499 (1977) . . .

A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference. As Justice White explained in his opinion for the Court in *Stanley v. Illinois*, 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208 (1972):

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 US 390, 399 . . . (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 US 535, 541 . . . (1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson*, 345 US 528, 533 . . . (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 US 158, 166 . . . (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, supra, at 399 . . . , the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, supra, at 541 . . . , and the Ninth Amendment, *Griswold v. Connecticut*, 381 US 479, 496 . . . (1965) . . . ." "

The petitioners, as the parents of CHRISTEN M. SHANNON, have demonstrated extraordinary love and commitment for their daughter. They have responded to her abundantly complicated needs with all available resources, both personal and financial, and have provided life-sustaining medically necessary care for CHRISTEN in their home. The petitioners are absolutely due the protection of their rights under *Hodgson*, and as guaranteed by the United States Constitution.

The cavalier violation of petitioners' familial Constitutional rights by the alleged Guardian ad Litem, a guardian by estoppel, should enrage this Court. The damage caused to petitioners' family through the willful abandonment by an alleged representative of the court of CHRISTEN's interests, can only be explained by the total litigation exhaustion of counsel for CHRISTEN, brought on by the circuity of action created by respondents who choose to litigate CHRISTEN M. SHANNON into submission, or the grave, and her parents into bankruptcy. The rules of law and civil procedure have simply failed to remedy the problems caused petitioners by the circuity of action created by respondents. Justice delayed is justice denied. There is no question that petitioners have been denied their Constitutional rights as a family by the respondents and the court below. This very unusual Constitutional question affects the Constitutional rights of every single family in the United States and therefore, certiorari should be granted by this Supreme Court.

CONCLUSION

The reasons for granting the Petition for a Writ of Certiorari in this case have been clearly defined and meet the requirements of Rule 10.1(a) and (c) of the Rules of the Supreme Court. The petitioners respectfully request that a Writ of Certiorari be issued to review this case.

Respectfully submitted,

JAMES P. SHANNON*

EDITH A. R. SHANNON

CHRISTEN M. SHANNON,
a Minor, by her Father
and Natural Guardian,
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APPENDIX

INDEX TO APPENDIX

	App. Page
Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, June 24, 1992	1
Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing, July 30, 1992	24
Judgment of the United States District Court for the Eastern District of Wisconsin, May 31, 1991	26
Order of the United States District Court for the Eastern District of Wisconsin, May 30, 1991	28
Hearing on Motion for Remand and Plan's Motion to Dismiss before the United States District Court for the Eastern District of Wisconsin, May 16, 1991	31
Certificate of Interest filed in the United States Court of Appeals for the Seventh Circuit, August 5, 1991	37
Letter from the Shannons to Quarles & Brady, September 3, 1991	39
Letter from Peck & Carey, P.C. to United States Court of Appeals for the Seventh Circuit, July 2, 1991	41
Letter from Peck & Carey, P.C. to J. Shannon, June 4, 1991	43
Constitutional Provisions, Statutes, Rules and Regulations Involved	45

[965 F.2d 542]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2494

CHRISTEN M. SHANNON, a minor,
by her Guardian ad Litem,

Plaintiff-Appellant,

v.

JAMES P. SHANNON and
EDITH A. R. SHANNON,

Defendants-Appellants,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
COMMERCIAL UNION INSURANCE COMPANIES,
STEVEN SCHULTZ, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 90 C 255—**J. P. Stadtmueller,** *Judge.*

ARGUED DECEMBER 12, 1991—DECIDED JUNE 24, 1992

Before WOOD, JR.,* COFFEY, and EASTERBROOK, *Circuit Judges.*

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* Judge Wood, Jr. assumed senior status on January 16, 1992, which was after oral argument in this case.

WOOD, JR., *Circuit Judge.* Three-year old Christen Shannon, the daughter of James P. and Edith Anne Rachel Shannon, nearly drowned in a lake next to their home on July 1, 1984. Tragically, she suffered extensive brain damage and was left a non-communicative, spastic quadriplegic, requiring 24-hour, life-sustaining, medical care, which she has received at home since December 1984: her airways must be suctioned frequently to prevent blockage, and she is fed through a gastrostomy tube that requires regular monitoring and maintenance. Because Mrs. Shannon worked for West Allis Memorial Hospital, Inc. ("WAMHI"), and was covered by the West Allis Memorial Hospital Employee Health Protection Plan ("Plan"), Christen's medical expenses were initially borne by the Plan. After paying out something over 1.3 million dollars, the Plan terminated its payments in September 1987 and was sued forthwith in federal court: that suit, Case No. 87-C-1206, is not at issue here but is not entirely irrelevant.

Through her guardian ad litem Christen, the plaintiff-appellant here, initiated a personal-injury suit against her parents, defendants-appellants, and their insurance company, United Services Automobile Association, defendants-appellees, in state court in 1985. The following year she added her next-door neighbors, Steven and Donna Schultz, who also owned lake-front property, and their insurer, Commercial Union Insurance Companies, all defendants-appellees.[1] The Plan, also a defendant-appellee here, intervened January 29, 1990, to assert subrogation and reimbursement claims under the terms of the plan against Christen and her parents. Christen and her parents each answered the Plan's cross-claims and counterclaims and raised counterclaims against the Plan.

The Plan, asserting federal jurisdiction based on the Employee Retirement Income Security Act ("ERISA"),

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[1] We suspect these parties were added because of uncertainty over, inter alia, whether Christen entered the lake from her parents' or neighbors' property and who might be liable.

promptly removed the case to the United States District Court for the Eastern District of Wisconsin. 29 U.S.C. §§ 1001 *et seq.*; 28 U.S.C. § 1441(c). Subsequently, Christen and her parents (collectively, the "Shannons") each sought remand, arguing the Plan was a governmental plan and, thus, exempt from ERISA. 28 U.S.C. § 1447(c); 29 U.S.C. § 1003(b)(1). The Plan, in turn, claiming the Shannons had raised only preempted, state-law claims, moved to dismiss the case for the Shannons' "failure to state a claim upon which relief can be granted." 29 U.S.C. § 1144; Fed. R. Civ. P. 12(b)(6).

The district court found the Plan was an ERISA plan, not a government plan, and, accordingly, denied the Shannons' motions to remand.[2] Concomitantly, the court dismissed the suit, stating that the Shannons' claims, "being state law claims, are preempted . . . ." The Shannons appeal.[3] For the reasons stated below we affirm the district court's denial of the motion to remand, but we reverse and vacate its dismissal of the case and remand with instructions.

ANALYSIS

The Shannons question both our jurisdiction to hear this appeal and that of the district court to decide whether the Plan is a governmental plan. They contend the state court is the one that must determine whether WAMHI

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[2] The court, however, did remand what it considered to be non-preempted claims: the personal-injury, subrogation and reimbursement claims.

[3] James P. and Edith Anne Rachel Shannon appeal pro se and on Christen's behalf. Acknowledging that some parties represented by counsel may, on occasion, attempt to shave various appellate rules and that pro se appellants are not held as strictly to "technicalities" as others, we note the Shannons have carefully followed the Federal Rules of Appellate Procedure and our own Circuit Rules. Their brief and reply brief conform to the requirements, are well written, and adequately cite the record and authority. All required filings were timely.

is an agency or instrumentality of the City of West Allis, Wisconsin ("City"), and, thus, whether the Plan is a governmental plan. 29 U.S.C. § 1002(32).

A primordial element of our jurisprudence is that federal courts have jurisdiction to determine whether they have subject matter jurisdiction. The Supreme Court, referring to its early exercise of jurisdiction to determine jurisdiction in *Winchester v. Jackson*, 7 U.S. (3 Cranch) 515 (1806), stated, "[T]here was jurisdiction in this court to consider and determine the question of jurisdiction of the Circuit Court . . . ." *Mansfield, Coldwater & Lake Michigan Railway v. Swan*, 111 U.S. 379, 387 (1884). In the eloquent words of Justice Holmes,

> But even if the Circuit Court had no jurisdiction to entertain Johnson's petition [for writ of habeas corpus], and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it.

United States v. Shipp, 203 U.S. 563, 573 (1906) (citing *Mansfield*, 111 U.S. at 387). *See also United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988) (citing *Shipp*, 203 U.S. at 573).

Our jurisdiction to determine jurisdiction is not diminished because an action is initiated in state court and subsequently removed to federal court. *See, for example, Mansfield*, 111 U.S. 379. Removal of a civil case is not based on a motion that a court, either state or federal, grants or denies; rather, it is a *fait accomplis* by the party initiating the removal petition. 28 U.S.C. §§ 1441, 1446. "Once the petition is filed in federal court, the state court is divested of jurisdiction over the case." Erwin Chimerinsky, FEDERAL JURISDICTION 234 (1989). Subsequently, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

Fundamentally, removal is a procedure created by federal statute that permits but does not require a defendant

in a state-court suit to move the case to federal court if the plaintiff's action could have been properly brought in federal court. Generally, a case may be removed only if "the suit—as the plaintiff framed or could easily have framed it in the complaint—would have been within the district court's original jurisdiction at the time of the removal." *Federal Deposit Insurance Corp. v. Elefant*, 790 F.2d 661, 667 (7th Cir. 1986) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), and *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). Moreover, a defense based on the United States Constitution or federal law does not make the suit removable, and neither does a counterclaim or other similar filing based on federal law. *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908); *Elefant*, 790 F.2d at 667 (citing *Takeda v. Northwestern National Life Insurance Co.*, 765 F.2d 815, 822 (9th Cir. 1985)).

There is an exception which controls in this case. Removal is proper even if federal jurisdiction is not evident from the complaint where, as here, "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of [ERISA] § 502(a) removable to federal court." *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 66 (1987) (citing 29 U.S.C. § 1132(a)). Accordingly, the Plan's intervention to enforce terms of the plan—namely, its alleged right to subrogation and reimbursement—more than likely invoked ERISA, preemption-based removal. 29 U.S.C. §§ 1132(a)(3)(B)(ii), 1132(e). If it did not, then the Shannons' subsequent counterclaims against the Plan surely did. Whether upon removal the district court had subject matter jurisdiction depends on whether the Plan is a governmental plan, exempt from ERISA. And that determination, in turn, depends upon whether WAMHI is a governmental or private entity.[4]

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[4] We use the term "governmental entity" to include, at a minimum, but not distinguish between governmental subdivision, agency, and instrumentality.

Thus, the district court had jurisdiction to determine whether it had subject matter jurisdiction, whether WAMHI was a governmental entity, and whether the Plan was a governmental plan. It entered a final order, and we, therefore, have jurisdiction over this appeal. 28 U.S.C. § 1291.

GOVERNMENTAL PLAN

The focus of our inquiry is whether WAMHI, the nonprofit, corporate lessee and operator of a city-owned hospital facility, known as the West Allis Memorial Hospital ("WAMH"),[5] is a governmental agency or instrumentality.[6] If it is, then, the parties agree the Plan is a governmental plan,[7] exempt from ERISA, and the Shannons would have their suit back in state court where they want it. Conversely, if WAMHI is not, the Plan is not exempt from ERISA, and there is preemption.

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[5] This controversy involves three distinct entities: (1) WAMHI, the corporation that operates the hospital facility, (2) the hospital facility itself, including the building and all other real property owned by the City of West Allis and leased to WAMHI, and (3) WAMH, which is what the public perceives as "the hospital," including the facility, the staff and the services offered.

[6] This is because, as defined in ERISA, "[t]he term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing." 29 U.S.C. § 1002(32). The parties here focus on whether WAMHI is a governmental "agency or instrumentality." We shall not limit our inquiry to those two terms but will also avail ourselves of definitions of governmental or political "subdivision" where enlightening and appropriate.

[7] Neither party has argued that even if WAMHI is a governmental agency or instrumentality, the Plan is not a governmental plan, although this is the more frequently litigated issue. *See, for example, Krystyniak v. Lake Zurich Community Unit District No. 95*, 783 F. Supp. 354 (N.D. Ill. November 14, 1991); *Brooks v. Chicago Housing Authority*, No. 89-C-9304, 1990 U.S. Dist. LEXIS 8233 (N.D. Ill. July 2, 1990). Perhaps the parties' stance is because WAMHI is the sole participating employer in this self-funded, self-administered plan.

The decision whether WAMHI is a private or governmental entity must be made according to federal law. On a similar, relevant matter, the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-03 (1971), stated, "Federal, rather than state, law governs the determination, under § 2(2) [of the National Labor Relations Act (29 U.S.C. § 152(2))], whether an entity created under state law is a 'political subdivision' of the State . . . ." In this light we agree with the court in *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 915 (2nd Cir. 1987), *cert. denied*, 485 U.S. 936 (1988): "Because ERISA is a federal statute, the term 'political subdivision' must be interpreted by reference to federal law, in the absence of clear legislative intent to the contrary."

But what is the appropriate test? The district court did not say, and we must proceed *de novo*. The Shannons argue for application of the symbiotic relationship test utilized in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and the public function test cited in *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). They also cite *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D. Mass. 1990). These cases, as the Shannons acknowledge, address constitutional issues of free speech, and, we add, the state action doctrine and civil rights. The concern in this case is not with constitutional liberties; rather, it is with proper application of a specific statute to a specific entity to determine whether it must do business according to state or federal law.

Moreover, the Shannons' reliance on *Rendell-Baker* is misplaced. That court did not endorse a generalized, public function test but stated, instead, the relevant question is "whether the function performed has been traditionally the *exclusive* prerogative of the State." *Rendell-Baker*, 457 U.S. at 842 (quotation marks and citations omitted; emphasis supplied by the *Rendell-Baker* court). Clearly, hospital care, while serving the public, is not the exclusive prerogative of the State. Additionally, the Court in *Garcia*

v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 531 (1985), a case arising under the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), held that drawing "the boundaries of state regulatory immunity in terms of 'traditional government function' is not only unworkable but is also inconsistent with established principles of federalism . . . ." *Garcia* went on to expressly overrule *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had adopted the traditional-government-function test, and, therefore, we think it puts the kibosh on whatever may be left of the Shannons' argument. *Garcia*, 469 U.S. at 531.

The appellees argue the essential test is whether the City of West Allis, a government, exercises daily control over WAMHI and cite two Internal Revenue Service Revenue Rulings and one Department of Labor Opinion Letter to that effect. Neither the rulings nor the letter analyze WAMHI itself, and the Secretary of Labor, who is the person with the authority to do so, has published no rule in the Code of Federal Regulations for determining if an entity is a governmental subdivision, agency or instrumentality within the meaning of ERISA, 29 U.S.C. § 1002(32). Furthermore, appellees have not identified any regulation published by the Secretary of Labor in the C.F.R. that defines "governmental subdivision, agency or instrumentality," although some do.

The Plan also cites *Krupp v. Lincoln University*, 663 F. Supp. 289 (E.D. Pa. 1987), for the proposition that an employee benefit plan at an institution performing a public function is not a governmental plan. *Krupp* did hold the University's plan was not governmental, but it did so because (a) the University had long been and was still a private, nonprofit corporation chartered for educational purposes and (b) recent state legislation that established Lincoln University as an " 'instrumentality of the Commonwealth to serve as a State-related institution' " had been enacted solely to provide greater financial support than the previous law had allowed. *Id.* at 291-92 (quoting 24 Pa. Stat. § 2510-402(7)). *Krupp*, therefore, is inapposite.

We think the proper test is the one implicitly approved, with limitations, in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-03 (1971). The test had been enunciated by the NLRB and applied under the National Labor Relations Act ("NLRA") as amended by the Labor-Management Relations Act ("LMRA"), codified at 29 U.S.C. §§ 141 *et seq.* Since 1971 the test has been regularly applied by federal courts to determine if a particular entity is a governmental subdivision, agency or instrumentality under the NLRA and the LMRA. *See, for example, NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442, 1448 (7th Cir. 1989) (not an exempt governmental entity under LMRA; 29 U.S.C. § 152(2)).

The test has been used in other labor-related cases as well to determine if a particular entity is entitled to a statutory exemption because it is a governmental subdivision, agency or instrumentality. These cases include *Brock v. Chicago Zoological Society*, 820 F.2d 909, 910 (7th Cir. 1987) (not exempt under Occupational Safety and Health Act of 1970; 29 U.S.C. § 652(5)); *Skills Development Services, Inc. v. Donovan*, 728 F.2d 294, 299-300 (6th Cir. 1984) (not exempt from Fair Labor Standards Act; 29 U.S.C. §§ 201 *et seq.*); *Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp.*, 547 F.2d 18, 20 (2nd Cir. 1976), *cert. denied*, 432 U.S. 906 (1977) (affirmed the exemption from the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, granted by the EEOC, which had applied the NLRB test from *Natural Gas Utility District*). Importantly, within the ERISA context that test was used in *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 915 (2nd Cir. 1987), and *Brooks v. Chicago Housing Authority*, No. 89-C-9304, 1990 U.S. Dist. LEXIS 8233 at *3 (N.D. Ill. July 2, 1990), and was cited in *Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger*, 709 F.2d 815 (3rd Cir. 1983), *vacated on other grounds sub nom. Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54*, 468 U.S. 491 (1984). Thus, we

adopt the NLRB test from *Natural Gas Utility District* to determine if WAMHI is a governmental subdivision, agency or instrumentality for the purposes of ERISA, 29 U.S.C. § 1002(32).

The test comprises two prongs, only one of which need be satisfied. The entity is a political subdivision if it is "*either* (1) created directly by the state, so as to constitute departments or administrative arms of the government, *or* (2) administered by individuals who are responsible to public officials or to the general electorate." *Natural Gas Utility District*, 402 U.S. at 604-05 (quoting the brief of the NLRB; emphasis added). There is a caveat: the Court expressly declined to decide whether " 'the actual operations and characteristics' of an entity must necessarily feature one or the other of the[se] . . . limitations to qualify . . . ." *Id.* at 605. This caveat is in keeping with an earlier statement of the Court in a similar vein: "[T]here is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality . . . ." *Department of Employment v. United States*, 385 U.S. 355, 358-59 (1966) (federal instrumentalities like the American Red Cross are exempt from state taxation). Consequently, the NLRB test from *Natural Gas Utility District* has not been deemed definitive in all applications, but we think it appropriate here.

We shall look first to the rule's application by the Supreme Court in *Natural Gas Utility District* and by the courts of appeals in five cases, the outcomes of which bear directly on whether WAMHI is a governmental or private entity.

The utility district in *Natural Gas Utility District*, found to be a governmental entity, was one of 270 such districts established by Tennessee statute and administered by individuals responsible to public officials. It was "administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens." *Natural Gas Utility District*, 402 U.S.

at 605. Additionally, the utility district was created by order of the county judge after a hearing on the merits; the order was appealable to the state appellate court. *Id.* at 606. Vacancies on the various utility district boards were filled in large counties by popular election and in others by appointment by the county judge when the remaining board members could not agree. *Id.* at 608. Moreover, the utility district had the power of eminent domain; its records were "public records"; and its revenue and the interest on bonds it issued were exempt from income taxation. *Id.* at 606-07. As we shall see, none of the features that characterized the Tennessee utility districts as governmental, except possibly for their revenue being tax exempt, are attributes of WAMHI.

On the other hand, the Truman Medical Center, Kansas City, Missouri ("Center"), was found to be a private entity. *Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570 (8th Cir. 1981). The Center, formed at the instance of the City of Kansas City, was a not-for-profit corporation organized under Missouri statutes; it was not created by statute or by act of any public official. *Id.* at 572. The Center operated hospitals under a series of contracts with the City, County, and University of Missouri but not under any legislative directive. *Id.* The Center was governed by a self-perpetuating board comprising 49 members, 18 of whom were appointed by the City, County, or University; the other 31 members of the board could not be removed by public officials or the general public; and the board's decisions were by majority vote and not subject to review by any governmental body. *Id.* at 573. The Center's records were not "public documents"; its employees were not covered by any governmental merit system; and it had no sovereign powers, such as the power of taxation or eminent domain. *Id.* at 572. Many of these characteristics are also attributes of WAMHI.

Likewise, the Jefferson County Community Center, one of twenty-two similarly formed, nonprofit Colorado corporations that provided services to mentally retarded and

seriously handicapped individuals, was found to be a private entity. *Jefferson County Community Center for Developmental Disabilities, Inc. v. NLRB*, 732 F.2d 122 (10th Cir.), *cert. denied*, 469 U.S. 1086 (1984). It was formed by individuals, and, although it functioned as part of a state-formulated scheme to provide services to retarded and handicapped persons, it did "not [do so] as a state-created department or administrative arm of government, but essentially as a private contractor." *Id.* at 125. The governing board comprised 15 members: 8 were appointed, 7 by "public agencies," and 7 were elected. An appointed director could be removed by vote of the board, but an elected one only by a majority of the corporation membership; thus, neither public officials nor the general electorate had the power of appointment or removal. *Id.* at 125-26. Additionally, the Center had neither the power of subpoena, taxation, or eminent domain nor the power to issue tax-exempt bonds. *Id.* at 126.

Our cases also provide important guidance in applying the NLRB test from *Natural Gas Utility District.* Three examples suffice. First, the Chicago Zoological Society, operator of the Brookfield Zoo, was found not to be a governmental subdivision despite relationships with the Forest Preserve District of Cook County ("District"), an admitted governmental agency, that intimated otherwise. *Brock v. Chicago Zoological Society*, 820 F.2d 909 (7th Cir. 1987). The Society received 50%-60% of its revenues from taxes raised by the District; the zoo sat on District-owned land; and the District had significant control over the Society's expenditure of revenues, including non-tax revenues. *Id.* at 911. On the other hand, only one member of the 35-member board of trustees was a public official, and of the 240 governing members who elect the trustees, only four were public officials. Moreover, the District had "no appointment and removal power and no direct role in the zoo's operation and maintenance." *Id.* at 912. The Society, as one of a number of zoological societies statewide, was not created by state law but was only "approved" to receive government contracts, and, although state officials

were instrumental in its founding, they had "deliberately designed it as a private entity to be operated independently of the District and other state agencies." *Id.* at 911. Lastly, the Society, not the District, signed its employees' paychecks, and its employees were not covered by the state's civil service rules, pension plan or workers' compensation fund. *Id.* at 912.

Second, the nonprofit, corporate operator of a foster home funded in large part by the State of Illinois was not sufficiently controlled by the Illinois Department of Children and Family Services to be a governmental subdivision. *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661 (7th Cir. 1990). Kemmerer Village, Inc., was heavily subsidized by the state and was "seeking to accomplish something the state want[ed] accomplished." *Id.* at 662-63. That was not enough, however, to make the corporation a governmental subdivision: the state neither created nor acquired it, it was not organized as a governmental entity, and there were no public directors. *Id.*

Third, in *NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989), we found the not-for-profit Illinois corporation that operated a 24-hour, intermediate-care facility for 100 severely and profoundly retarded adults was not a governmental entity. The corporation was licensed and regulated by the state, and it received state funds. The state had built the facility pursuant to statutory directive. After a 23-month interval during which it was owned and operated by St. Clair County, the facility reverted to the state, which then contracted out its operation. We noted the facility was not the employer; rather, the corporation that managed the facility was the employer. *Id.* at 1448-49. Furthermore, we stated, "Indeed, if a not-for-profit corporation *operates a hospital pursuant to a contract* with the state as opposed to a statutory duty, the employer is 'not transformed into a political subdivision of the State.' " *Id.* at 1449 (citing *Truman Medical Center*, 641 F.2d at 572; emphasis added). Indeed, this statement by the *Parents & Friends* court demolishes most of the superstructure of

the Shannons' argument that WAMHI is a governmental entity.

We now turn to the determinative facts of this case and would ordinarily proceed as have the above cited courts in applying the test. That is, we would first determine, based on the record, if the entity had been created directly by the state or a political subdivision, such as a city, so as to constitute a department or arm of the government. If it had not been, we would then determine, based on the record, if the entity were administered by individuals who are responsible to public officials or the general electorate. However, because neither the parties nor the district court used the NLRB test from *Natural Gas Utility District*, we must look at the facts—both those upon which the court relied[8] and those reargued by the Shannons—seriatim, applying the test as we go.

The City of West Allis built and initially operated what is now known as West Allis Memorial Hospital. In 1963 the City leased the facility to and turned over its entire operation, including accumulated assets and liabilities, to WAMHI. The Shannons first argue that the City's construction and continued ownership of the physical plant shows WAMHI was created by the City, but that does not follow *Truman Medical Center*, *Chicago Zoological Society*, and *Parents & Friends*. Ownership of realty by a government, here the City of West Allis, and the leasing of that realty to a nonprofit corporation, without more, does not prove the corporation was created by the state so as to constitute a department or administrative arm of the government. The Shannons argue, however, that the lessor-lessee relationship does show WAMHI is administered by officials who are responsible to public officials. We think not, as the above cases make clear.

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[8] In its order of May 30, 1991, denying the Shannons' motion to remand, the court stated no reasons for finding the Plan was not a governmental plan but, instead, referred to reasons stated from the bench two weeks earlier. Those reasons are found in the trial record of May 16, 1991, at 20-24.

On appeal the Shannons argue the lease between the City and WAMHI expired in 1988 by operation of Wisconsin statute and conclude the City, therefore, actually operates WAMH. At oral argument appellees skirted this claim but assured us the lease was still in effect. It matters not. The Shannons do not state they raised the issue in the district court, and it appears they did not. Therefore, this issue is waived. *Maciosek v. Blue Cross & Blue Shield United of Wisconsin*, 930 F.2d 536, 540 n.2 (7th Cir. 1991).

Ten incorporators, nominated by the West Allis Common Council, incorporated WAMHI under the laws of Wisconsin as a private, non-stock, nonprofit corporation. The City Attorney, as authorized by the Common Council, drafted the articles of incorporation and the bylaws. Upon later action by the Common Council, subsequent incorporation, and pursuant to the articles of incorporation, the ten incorporators became the first board of directors of WAMHI ("Board"). Thus, at first blush it might appear the City created WAMHI. Despite the City's nurturing, however, it did not create WAMHI. The ten incorporators did. They did it by following procedures specified in Wisconsin statutes for forming nonprofit corporations, and in so doing they expressly formed a private not a governmental corporation. Contrast the utility district in *Natural Gas Utility District* with the corporations in *Truman Medical Center, Jefferson County Community Center, Chicago Zoological Society, Kemmerer Village*, and *Parents & Friends*. Moreover, the corporation was not created as a department or arm of the government; nor did it become one because it replaced the City as operator of the hospital. Were the law otherwise, it would seem impossible or nearly so for a government to divest itself of any of its operations; there would be no route to privatization, but there is.

In addition to arguing that the City created WAMHI the Shannons strongly argue that the Board is controlled by, meaning responsible to, City officials. They point to the following facts: (1) the City "appointed" the first

Board, (2) the City Comptroller is always a member of the Board, but, as appellees point out, the position is *ex officio*, although it is with the right to vote, and (3) only persons who are residents of or have a business interest in West Allis may be Board members.

It may be difficult to visualize a political system where what appears to be the power to make initial appointments does not carry with it the power to control. Here, however, the City does not have the requisite control of the Board (1) because it cannot remove any member of the Board and (2) because, having once approved the initial composition of the Board, which may not have been an exercise of the appointment power as envisioned in our cases, it cannot appoint or reappoint any person to the Board. Only the Board, as provided in the articles of incorporation and bylaws, has the power to appoint or reappoint members. This carefully crafted separation of power was meticulously exercised during a crisis that befell WAMHI in early 1970. The Board resigned *en masse*, but only after it appointed a successor Board, albeit based on recommendations it had sought and received from the Common Council. These limited acts by the City are not sufficient proof that WAMHI is responsible to public officials.

Furthermore, the presence of one *ex officio* but voting City official, the comptroller, on a board of thirteen does not give control to the City or make the Board responsible to City officials. *See Truman Medical Center, Jefferson County Community Center*, and *Chicago Zoological Society*. It is reasonable that the City, given its financial interest in the realty that WAMHI operates and in the lease revenues it generates, would want to keep a finger on WAMHI's economic pulse. This does not mean it controls WAMHI's heartbeat. Also, the local residency or business-interest requirement for Board membership is not proof of City governmental control. Lastly, the Board is not elected by the general public. So far, there is no showing that the Board is responsible to public officials or the general public.

Two factors did give the district court some cause for concern: namely, WAMHI has prepared various reports

for the City, and the City has issued bonds to finance expansion of the hospital facility. Neither one shows creation by a government or responsibility to public officials or the general electorate. The Shannons do not explain how filing a report, even if required periodically, demonstrates the requisite control. If the filing of a mandatory report with the government were sufficient indicia, would not every business in America be a government entity? And the City's issuing tax-exempt bonds to expand its own hospital facility does not demonstrate that WAMHI is a governmental entity of some sort. Would not any prudent lessor act similarly, improving its realty to enhance revenues from a responsible, long-term lessee? More importantly, it was the *City* that issued the bonds, not WAMHI; WAMHI was not exercising a sovereign power, quite probably because, as a private entity, it had none to exercise. Contrast the power of the governmental entity in *Natural Gas Utility District* to issue tax-exempt bonds with the absence of that power in the private corporations in *Truman Medical Center* and *Jefferson County Community Center.*

The Shannons' remaining arguments are that WAMHI was established for a public purpose and that the lease with the City requires WAMHI to transfer its assets and liabilities back to the City upon expiration of the lease. The contracted-for providing of health care to indigents did not persuade the court in *Truman Medical Center*, 641 F.2d at 572, and the contracted-for providing of health care services in West Allis, Wisconsin, whether to indigents or not, does not persuade us that the corporation operating the hospital facility is a governmental entity. And we cannot see how WAMHI's returning to the City that which it was first granted, WAMH's assets and liabilities, although perhaps in different amounts, identifies WAMHI either as created by the state as a department or administrative arm of government or as responsible to public officials or the general electorate.

Lastly, appellees point to the fact that the City and WAMHI maintain separate payrolls, health insurance plans

and pension plans. These were important indicia in *Chicago Zoological Society* that the Society was not governmental; they are no less significant here.

For the above reasons we hold the district court correctly found that West Allis Memorial Hospital, Inc., is not a governmental subdivision, agency or instrumentality and that the West Allis Memorial Hospital Employee Benefit Plan, accordingly, is not a governmental plan. The district court, thus, properly found it had subject matter jurisdiction and correctly denied the motion to remand.

RULE 12(b)(6) DISMISSAL

Based entirely on ERISA's preemption of state law claims, the court dismissed the suit for failure to state a claim for which relief could be granted. 29 U.S.C. § 1144; Fed. R. Civ. P. 12(b)(6). We must now hold the district court erred in so doing. Unfortunately, the court did not have the benefit at the time of a recent case of this court which we next discuss.

On the same day we heard the present appeal we heard the appeal of a case that had originated in state court as an action for breach of contract, had been removed on the basis of ERISA's grant of federal jurisdiction, and was then dismissed under Rule 12(b)(6). *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073 (7th Cir. 1992). We initially found the plaintiff-appellant, Bartholet, had raised a claim that related to a benefit plan and, therefore, that ERISA preempted his state common-law claims. *Id.* at 1077. We added:

> It does not follow, however, that Bartholet's suit should have been dismissed under Rule 12(b)(6). The district judge believed that until Bartholet amended his pleadings to invoke ERISA, all he had was a claim arising under state common law, and as state law is preempted the complaint failed. The assumption implicit in this approach is that a complaint must plead law as well as fact. Why? Rule 8(a) of the Federal Rules of Civil Procedure says that a complaint

> must identify the basis of jurisdiction and "contain a short and plain statement of the claim showing that the pleader is entitled to relief." Although it is common to draft complaints with multiple counts, each of which specifies a single statute or legal rule, nothing in the Rules of Civil Procedure requires this. To the contrary, the rules discourage it. . . .
>
> A complaint under Rule 8 limns the claim; details of both fact and law come later, in other documents. Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations. . . . [T]he complaint need not identify a legal theory, and specifying an incorrect theory is not fatal.

Id. at 1077-78 (citations omitted).

As in *Bartholet*, the district judge here dismissed the Shannons' claims because they erroneously stated their claims were founded in state common law and, also, erroneously denied that ERISA applied. This is not a case that begs dismissal because the plaintiff, represented by counsel who knows the law is otherwise, nonetheless, deliberately seeks to avoid a federal cause of action by filing only state law claims in a state court. *See, for example, Maciosek v. Blue Cross & Blue Shield United of Wisconsin*, 930 F.2d 536, 540-41 (7th Cir. 1991). Rather, only after the Plan intervened in state court and filed a cross-claim and a counterclaim did the Shannons respond by filing their own counterclaim against the Plan. Furthermore, as we observed above, it was more than likely the Plan's intervention to enforce terms of the plan, not the Shannons' response, that mandated ERISA-based federal jurisdiction. 29 U.S.C. §§ 1132(a)(3)(B)(ii), 1132(e).

Therefore, we vacate the district court's order dismissing the suit. On remand the court must determine "whether relief is possible under any set of facts that could be established consistent with the allegations," either in the Shannons' counterclaims or in amended counterclaims should

the court choose to allow amendment. *Bartholet*, 953 F.2d at 1078. *See, for example, Armbruster v. Benefit Trust Life Insurance Co.*, 687 F. Supp. 403, 405-06 (N.D. Ill. 1988).

Lastly, the Shannons already have or, at least, had an ERISA-based suit against the Plan in federal court. The appellees argue the present suit was properly dismissed because it represents an impermissible attempt by the Shannons to split and relitigate claims they asserted or could have asserted in Case No. 87-C-1206. This issue was not decided by the district court, and we shall not either. Therefore, on remand the court may also need to decide that issue along with any others the parties may appropriately raise.[9]

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[9] One issue that the district court should consider even if the parties do not raise it is Mr. Shannon's ability to litigate on behalf of his daughter. James Shannon prosecuted this appeal without the assistance of counsel, and although he is her natural guardian and did a fine job as her advocate, there is a substantial problem. This case carries the caption "Shannon v. Shannon" because Christen brought it against her father, among other defendants. Although her father's status as a defendant may have more to do with an effort to collect insurance than with any desire to move resources from one pocket to another within the family, interfamilial litigation came with the appointment of a guardian *ad litem* for Christen. That guardian, who owes duties to the judicial system as well as to Christen, *see Romasko v. Milwaukee*, 108 Wis. 2d 32, 321 N.W.2d 123 (1982), is a missing person on this appeal. Whether this has occurred because Mr. Shannon believed that it would assist in avoiding the effect of the guardian's ERISA suit, or because Mr. Shannon is dissatisfied with the guardian's services, or because both sides have concealed this litigation from the guardian, or because the guardian has been inattentive to Christen's needs, is beside the point. The guardian *ad litem* must be notified of the appeal, and his views discovered. The guardian must be "present at all hearings . . . if the [ward] does not have full legal counsel." *Wisconsin ex rel. Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985). As we understand Wisconsin's law, the guardian is free to embrace the result of this litigation or to disavow it, and the district court

(Footnote continued on following page)

Parties shall bear their own costs.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[9] *continued*

must honor that choice. (We give it leave to do so without any further instructions from us.) If there are legitimate grounds for dissatisfaction with the performance of the guardian *ad litem*, Mr. Shannon must apply to the court that appointed the guardian rather than proceeding as if the guardian did not exist. The guardian *ad litem* must either protect Christen's interests diligently or ask the court that appointed him to be relieved; to protect Christen's interests the court pursuant to Wisconsin law then must appoint another guardian *ad litem* who will be present and participate in all future hearings.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: June 24, 1992

BEFORE:
Honorable Harlington Wood, Jr., Circuit Judge*
Honorable John L. Coffey, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

No. 91-2494

CHRISTEN M. SHANNON, a minor, by her Guardian ad Litem,
Plaintiff-Appellant

v.

JAMES P. SHANNON and EDITH A.R. SHANNON,
Defendants-Appellants

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, COMMERCIAL UNION INSURANCE COMPANIES, STEVEN SCHULTZ, et al.,
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Wisconsin,
No. 90 C 255, Judge J. P. Stadtmueller

* Judge Wood, Jr. assumed senior status on January 16, 1992, which was after oral argument in this case.
(1061-030690)

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in part, VACATED, in part, and REMANDED; Parties shall bear their own costs, in accordance with the decision of this court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 30, 1992

Before

Honorable HARLINGTON WOOD, JR., Circuit Judge*
Honorable JOHN L. COFFEY, Circuit Judge
Honorable FRANK H. EASTERBROOK, Circuit Judge

No. 91-2494

CHRISTEN M. SHANNON, a minor, by her Guardian ad Litem,
Plaintiff-Appellant,

v.

JAMES P. SHANNON and EDITH A.R. SHANNON,
Defendants-Appellants,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, COMMERCIAL UNION INSURANCE COMPANIES, STEVEN SCHULTZ, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin,
No. 90 C 255—J.P. Stadtmueller, *Judge.*

---

* Judge Wood, Jr. assumed senior status on January 16, 1992, which was after oral argument in this case.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by appellants on July 7, 1992, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for hearing *in banc* be, and the same is hereby, DENIED.

[FILED MAY 31, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

CHRISTEN MICHAELA SHANNON,
a minor, by her Guardian ad Litem,

Plaintiff,

v.

Case Number:
90-C-255

UNITED SERVICES AUTOMOBILE
ASSOCIATION, et al.,

Defendants.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants James and Edith Shannon's motion to remand for lack of Federal subject matter jurisdiction is hereby DENIED, in that it is found that this court has subject matter jurisdiction over the pending claims against the "Plan" pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) because the "Plan" is governed by ERISA and not within the governmental plan exception to ERISA.

The parties previously stipulated, pursuant to 28 U.S.C. § 1441(c), to an order remanding to state court the portions of this case involving the personal injury and subrogation/reimbursement claims. There remain state law claims which are preempted by virtue of the fact that the court has ruled that the "Plan" is an ERISA plan; therefore,

IT IS FURTHER ORDERED AND ADJUDGED that the "Plan's" June 8, 1990 motion to dismiss the plaintiff's and the Shannon's claims is hereby GRANTED and this pending Federal District Court action is DISMISSED.

APPROVED: /s/ J.P. Stadtmueller
Hon. J.P. Stadtmueller, U.S. District Judge

May 31, 1991
Date

SOFRON B. NEDILSKY
Clerk

/s/ Valerie L. Hass
(By) Deputy Clerk

[FILED MAY 30, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 90-C-0255

CHRISTEN MICHAELA SHANNON,
a minor, by her Guardian ad Litem,

Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, COMMERCIAL UNION INSURANCE COMPANIES, STEVEN SCHULTZ, DONNA SCHULTZ, JAMES P. SHANNON, EDITH ANN RACHEL SHANNON, and WEST ALLIS MEMORIAL HOSPITAL EMPLOYEE HEALTH PROTECTION PLAN,

Defendants.

ORDER

1. This case was removed from Milwaukee County Circuit Court by defendant West Allis Memorial Hospital Employee Health Protection Plan ("Plan") pursuant to a notice of removal dated March 14, 1990. The claims giving rise to the Plan's right of removal were plaintiff's state law claims against the Plan arising out of the Plan's alleged improper denial of benefits. Federal question jurisdiction was premised on ERISA's grant of federal subject matter jurisdiction, 29 U.S.C. § 1132(e), and on ERISA's complete preemption of state law claims arising out of the denial of benefits, 29 U.S.C. § 1144.

2. Defendants James and Edith Shannon (the "Shannons") filed a motion dated May 17, 1990 to remand the case, arguing that the Court had no subject matter jurisdiction because the Plan was a governmental plan not covered by ERISA. (On the same reasoning, plaintiff Christen Shannon, by motion dated May 30, 1990, moved to remand the related benefit denial litigation pending in this Court captioned *Christen Shannon v. Employers Health Insurance Company, et al.*, Case No. 87-C-1206.)

3. The parties to this case stipulated pursuant to 28 U.S.C. § 1441(c) to an order remanding to state court the portions of this case involving the personal injury and subrogation/reimbursement claims. The parties also stipulated that this Court would retain jurisdiction, at least until the motion to remand was decided, over the aspects of the case related to the plaintiff's and the Shannons' allegations against the Plan, namely: (a) paragraph 1 of Plaintiff's Affirmative Defenses in Plaintiff's Reply to the Counterclaim of West Allis Memorial Hospital Employee Health Protection Plan, dated February 27, 1990, and the portion of the same February 27, 1990 pleading entitled Plaintiff's Claims Against West Allis Memorial Hospital Employee Health Protection Plan (including the demand for judgment); (b) the Plan's March 20, 1990 Answer and Affirmative Defenses to plaintiff's foregoing February 27, 1990 pleading against the Plan; (c) that portion of the pleading dated March 5, 1990 filed by the Shannons entitled Cross-Claim; and (d) the Plan's March 28 Answer and Affirmative Defenses to the foregoing March 5, 1990 Cross-Claim.

4. A hearing on the Shannons' motion to remand was held before this Court on May 16, 1991. Daniel C. Sullivan appeared for the Shannons, Lynn E. Carey appeared for

plaintiff Christen Shannon, and David Cross and James Lucke appeared for the Plan.

5. After considering the submissions of the parties, including the submissions of the Plan, West Allis Memorial Hospital, and Christen Shannon concerning the motion to remand in the related case, No. 87-C-1206, and after considering the arguments of counsel, the Court finds, for the reasons stated by the Court on the record on May 16, 1991, that removal was proper and this Court has subject matter jurisdiction over the pending claims against the Plan pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) because the Plan is governed by ERISA and not within the governmental plan exception to ERISA. The motion to remand is, therefore, DENIED.

6. Although the Shannons and the plaintiff disagree with the Court's denial of the motion to remand, the plaintiff and the Shannons recognize that their claims pending in this Court against the Plan, being state law claims, are preempted if the Plan is an ERISA plan, as the Court has ruled. The Court, therefore, GRANTS the Plan's June 8, 1990 motion to dismiss the plaintiff's and the Shannons' claims.

SO ORDERED this 30th day of May, 1991.

/s/ J.P. Stadtmueller
Joseph P. Stadtmueller
U.S. District Judge

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 90-C-0255

CHRISTEN MICHAELA SHANNON,
a Minor, by her Guardian ad Litem,

Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, COMMERCIAL UNION INSURANCE COMPANIES, STEVEN SCHULTZ, DONNA SCHULTZ, JAMES P. SHANNON, EDITH ANN RACHEL SHANNON, and WEST ALLIS MEMORIAL HOSPITAL EMPLOYEE HEALTH PROTECTION PLAN,

Defendants.

HEARING ON MOTION FOR REMAND AND PLAN'S MOTION TO DISMISS

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on May 16, 1991, commencing at 1:35 p.m.

[2] APPEARANCES

MS. LYNN E. CAREY, of Peck & Carey, S.C., 105 E. Wisconsin Avenue, Oconomowoc, WI 53066, on behalf of the minor plaintiff Christen Shannon.

MR. DANIEL C. SULLIVAN, of Sullivan & Associates, Ltd., 1001 W. 31st Street, Suite 102, Downers Grove, IL 60515, on behalf of the defendants James P. Shannon and Edith Ann Rachel Shannon.

MR. DAVID R. CROSS and MR. JAMES T. LUCKE, of Quarles & Brady, 411 E. Wisconsin Avenue, Milwaukee, WI 53202, on behalf of the defendant West Allis Memorial Hospital Employee Health Protection Plan.

MR. RONALD L. PIETTE, of Piette, Nelson, Zimmerman & Dries, S.C., P.O. Box 26577, Milwaukee, WI 53226-0577, on behalf of the defendants Commercial Union Insurance Companies, Steven Schultz and Donna Schultz.

ALSO PRESENT: John Hoaglund, Esq.

* * * * *

[20] Ms. Carey, do you have anything you want to add?

MS. CAREY: One quick word, Your Honor, and that is that if we interpret the statute the way Mr. Cross wants, we have effectively eliminated the word "instrumentality." West Allis Memorial Hospital was acting as an instrumentality of West Allis. The City of West Allis ran that Hospital before, and then they asked someone else to do it. And I don't—when Congress wrote this statuse, they did not say that "governmental plan" means plans which cover governmental employees. That would—that also would completely eliminate any meaning for the word "instrumentality;" and I think we have to interpret the statute that gives meaning to all those words.

THE COURT: Well, what this case has certainly brought to bear both on this issue as well as many others is the simple reality that as much as we would all like to, we do not live in a perfect world, far from it. In spite of the

democracy and all of the enjoyments that we have as citizens, it is by no means utopia or perfect.

With regard to Mr. Sullivan's suggestion that this case needs to go back to the state court for some factfinding with regard to the matters that are the subject of the plaintiff's position, namely, what really is the relationship between West Allis Memorial Hospital and the City of West Allis, the fact is it is their motion that has come before the court. And I have, frankly, in my twenty-some-odd years of practice never run into [21] a situation where one judge is supposed to rely on some factfinding in another district or another forum to resolve a motion that is before this branch of the court.

More importantly, as Mr. Cross has so ably drawn to the court's attention, the underlying facts here really are not in dispute. What is in dispute is how the court is to interpret those facts as they have been marshaled by both parties. And if there were a conflict as to who appoints the board members or how the operating expenses at West Allis Memorial are covered or if indeed the facts demonstrated that the 1400-and-some-odd employees at West Allis Memorial were included in the City of West Allis Retirement and Health and Welfare Benefit Plan, perhaps the question would be much more difficult and perhaps closer.

But the reality here is that we are dealing with a situation in which we have a hospital that had its humble beginnings as the result of what might be described as a local initiative through the political process, namely, city government. And that is how many activities that down the road become part of the private sector have their beginnings simply because there is no group, whether it's a religious order or otherwise, who has the capital to

begin the operation of a hospital such as West Allis has grown to be over the past twenty-some-odd years.

The fact, however, is that once the land was acquired, the [22] building built, the entirety of the operation was for all intents and purposes left in the hands of a non-profit corporation. Yes, there are reports periodically, annually in some cases that are received by the City and, yes, there has been an infusion of capital through the City's bonding activities over the years for additions and remodeling and expansion and the like; but in the court's view those activities do not begin to reach the status of the Hospital being a significant arm of the City of West Allis such that it could be viewed for purposes of ERISA as the alterego of the City of West Allis.

The employees far outnumber the employees of the City. The City has no involvement in the day-to-day management operation or activities that take place at West Allis Memorial. It's true that a City employee or a City official is a member of the board, but that too is clearly not unusual given the fact that the City does have an interest in the facility having contributed to the land and building and the expansion that has taken place there over a considerable period of time.

Similarly, as Mr. Cross has pointed out, the Plan at West Allis Memorial Hospital is subject to the Pension Guaranty insurance formula that is required of all ERISA plans. And to suggest that in the context of this litigation in which the plaintiffs are endeavoring to pierce that veil of protection that on the other side of the coin they need to avail themselves of that protection were this case in perhaps another [23] context other than the context that the matters have been presented to the court, they would I think without question be seeking the benefits

of the ERISA protection, whether it's the rights of claimants or beneficiaries, the insurance protection that is accorded the Plan under the Pension Guaranty Benefit insurance, as well as the other attributes that attend the ERISA function.

And what we have here is essentially an attempt to circumvent the simple reality, as the Seventh Circuit has just ruled recently and sanctioned a lawyer in the process significantly, that these state law claims are simply not available under the aegis of the benefit plan being an ERISA plan.

And for all of the reasons that have been brought to the court's attention factually, I find that the West Allis Memorial Hospital Plan is indeed an ERISA plan governed by the provisions of ERISA; and, accordingly, as to both cases, that is the 1987 case and the 1990 case, the court will enter an order denying the motion to remand these cases back to the state court for either fact-finding on the question of the relationship between the Hospital and the City of West Allis or for purposes of allowing these state law claims to be further litigated since I find that they are indeed encompassed within the ERISA provisions.

Mr. Cross, I'll ask that you prepare appropriate orders in [24] both cases denying the motions for remand. Where this leaves these two cases in light of the Seventh Circuit opinion in *Maciosek* I'm not certain, but obviously that is a matter that will now have to be addressed in terms of whether or not particularly the nonERISA claims ought be further pursued and indeed what the relationship is between the 1987 case and the 1990 case since essentially the same claims are being raised in the context of crosspleadings in the 1990 action filed in state court.

So I'll leave that to counsel to further cogitate on and digest, and perhaps you can all resolve the matter in light of the Seventh Circuit's recent opinion. Thank you all for being available this afternoon. The court stands in recess until three o'clock.

(Proceedings concluded at 2:12 p.m.)

CERTIFICATE

I, Christine L. Petrie, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 3rd day of July, 1991.

/s/ Christine L. Petrie
Christine L. Petrie, RPR-CM
Official Court Reporter

[DATED AUGUST 5, 1991]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2494

CHRISTEN MICHAELA SHANNON,
a Minor, by her Guardian ad Litem,

Plaintiff,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, COMMERCIAL UNION INSURANCE COMPANIES, STEVEN SCHULTZ, DONNA SCHULTZ, JAMES P. SHANNON, EDITH ANN RACHEL SHANNON, and WEST ALLIS MEMORIAL HOSPITAL EMPLOYEE HEALTH PROTECTION PLAN,

Defendants.

CERTIFICATE OF INTEREST

The undersigned, Plaintiff-Appellant Christen M. Shannon and Defendants-Appellants James P. Shannon and Edith Anne Rachel Shannon furnishes the following list in compliance with Circuit Rule 12(d).

(1) Christen M. Shannon
James P. Shannon
Edith Anne Rachel Shannon

(2) (i) Not Applicable
(ii) Not Applicable

(3) Appeared for Christen M. Shannon by her alleged Guardian Ad Litem Harry F. Peck

PECK & CAREY, S.C.
Lynn Carey & Harry F. Peck
105 E. Wisconsin Avenue
Oconomowoc, WI 53066

Above firm will not appear on appeal

Appeared for James P. Shannon and Edith Anne Rachel Shannon

SULLIVAN & ASSOCIATES, LTD.
Daniel C. Sullivan
900 Jorie Blvd., Suite 100
Oak Brook, Illinois 60521

Above firm will not appear on appeal

Appearing on Appeal Pro Se

Christen M. Shannon
by her father and natural guardian
James P. Shannon

James P. Shannon
Edith Anne Rachel Shannon
Rt. #1 Box 244
Elkhorn, WI 53121

/s/ James P. Shannon
James P. Shannon

August 5, 1991

(Letterhead Of)

James P. Shannon
Edith R. Shannon
Christen M. Shannon

Rt 1 Box 244
Elkhorn, WI. 53121

September 3, 1991

Quarles & Brady
Mr. James T. Lucke
411 E. Wisconsin Ave.
Milwaukee, WI 53202-4497

Dear Mr. Lucke:

As previously discussed on Friday August 30, 1991 please find attached letter of Peck & Carey to the Clerk of Courts, U.S. Court of Appeals dated July 2, 1991, previously received by all parties, and letters of Peck & Carey addressed to James Shannon dated June 4, 1991 and June 5, 1991. Please note both letters indicate unquestionable withdrawal by Peck & Carey from representation of Christen Shannon in Federal Court.

You and all parties in Case No. 674-222 have known since our notice of appeal in Federal Court that I am representing Christen as her father and natural guardian, pro se, in Case No. 91-2494 on appeal in Federal Court.

Please take notice the Undersigned have relied upon the lack of action by Peck & Carey and the letters attached as notice and proof of their withdrawal as Christen's attorneys in Federal Court. Peck & Carey are totally without authority to release Christen's claims against West Allis Memorial Hospital or West Allis Memorial Hospital's Employee Health Protection Plan, now pending in Federal Court.

Very truly yours,

/s/ James P. Shannon
James P. Shannon, pro se

/s/ Edith Ann Rachel Shannon
Edith R. Shannon, pro se

/s/ Christen M. Shannon
Christen M. Shannon, pro se by her father
and natural guardian

c: Hon. Patricia S. Curley
Atty. Daniel C. Sullivan
Asst. Atty. General Richard Victor
Atty. Francis R. Croak
Atty. Calvin C. Thur
Atty. Terry E. Johnson
Atty. Ronald L. Piette
Atty. Roger W. Clark
Attys. Peck & Carey, S.C.
Clerk, U.S. Court of Appeals
for the Seventh Circuit

(Letterhead Of)

PECK & CAREY, S.C.
Attorneys at Law
105 East Wisconsin Avenue
P.O. Box 675
Oconomowoc, WI 53066-3033

July 2, 1991

Office of the Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, IL 60604

Re: Shannon, Christen M. vs United Services
Appellate Court No.: 91-2494
District Court Judge: J.P. Stadtmueller
District Court No.: 90 C 255

Notice of Non-involvement

Dear Clerk,

Please take notice that I will not appear for the minor plaintiff, Christen Michaela Shannon herein. A joint notice of appeal was filed by her parents on their own behalf and on her behalf pro se. I represented the minor plaintiff in the court below. My partner, Harry F. Peck, is her guardian ad litem. The appeal was filed by the parents without either my or Mr. Peck's knowledge or approval. For reasons which are complicated and not germane, neither of us can communicate with the parents and are not on good terms with them.

It is my opinion that an appeal is not well grounded and is not in the minor plaintiff's best interest. For these rea-

sons, I will not enter an appearance on her behalf or otherwise be involved.

Thank you for your assistance in this matter.

Very truly yours,

PECK & CAREY, S.C.

/s/ Lynn Carey
Lynn Carey

c: Hon. Patricia S. Curley
Atty. Daniel Sullivan
Asst. Atty. Gen. Richard Victor
Atty. Kevin Lyons
Atty. Terry Race
Atty. Terry E. Johnson
Atty. Ronald L. Piette
Atty. David Cross
Atty. Calvin C. Thur
Mr. James Shannon

(Letterhead Of)

PECK & CAREY, S.C.
Attorneys at Law
105 East Wisconsin Avenue
P.O. Box 675
Oconomowoc, WI 53066-3033

June 4, 1991

Mr. James Shannon
Route 1 Box 244
LL895 West Shore Drive
Elkhorn, WI 53121

Re: Federal Case No. 90 C 255
(personal injury case)

Dear Jim,

Enclosed are copies of papers dismissing what remains of the personal injury case before Judge Stadtmueller in federal court. We do not intend to take any further action in this case on Christen's behalf. The entire personal injury case is now pending in state court. I am sending you these papers since, as her legal guardian, you may decide to appeal on her behalf. I have not yet received an order in the original federal case.

Very truly yours,

PECK & CAREY, S.C.

/s/ Lynn Carey
Lynn Carey

Enclosure

c: Dan Sullivan (letter only)

(Letterhead Of)

PECK & CAREY, S.C.
Attorneys at Law
105 East Wisconsin Avenue
P.O. Box 675
Oconomowoc, WI 53066-3033

June 5, 1991

Mr. James Shannon
Route 1 Box 244
LL895 West Shore Drive
Elkhorn, WI 53121

Dear Jim,

Enclosed is a copy of the order signed by Judge Stadtmueller in the West Allis case dismissing the state law claims. We do not intend to take any further action on Christen's behalf with regard to this dismissal. I do not know if an appeal is possible at the present time, but as her natural guardian, you may wish to investigate that. The claims made for relief under E.R.I.S.A. are still pending.

Very truly yours,

PECK & CAREY, S.C.

/s/ Lynn Carey
Lynn Carey

Enclosure

c: Dan Sullivan (letter only)

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTION:

ARTICLE I, Section 10 provides:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

ARTICLE VI provides:

> All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases aris-

ing in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT IX provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV, Section 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XIV, Section 5 provides:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WISCONSIN CONSTITUTION:

ARTICLE I, provides, in pertinent part:

Equality; Inherent Rights. SECTION 1. All people born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

* * * * *

Trial by jury; verdict in civil cases. SECTION 5. The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

* * * * *

Remedy for wrongs. SECTION 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

* * * * *

Attainder; ex post facto; contracts. SECTION 12. No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate.

* * * * *

Private property for public use. SECTION 13. The property of no person shall be taken for public use without just compensation therefor.

* * * * *

Maintenance of free government. SECTION 22. The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.

ARTICLE IV provides, in pertinent part:

* * * * *

Oath of office. SECTION 28. Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the State of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability.

ARTICLE VIII provides, in pertinent part:

* * * * *

SECTION 3. Except as provided in s.7(2)(a), the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation.

SECTION 4. The state shall never contract any public debt except in the cases and manner herein provided.

UNITED STATES STATUTES:

28 U.S.C. § 1254 provides, in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal base, before or after rendition of judgment or decree;

* * * * *

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States
>
> * * * * *

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1603 provides, in pertinent part:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.
>
> * * * * *

28 U.S.C. § 2101(e) provides:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

29 U.S.C. § 141 et seq provides, in pertinent part:

(a) This Act [29 USCS §§ 141-144, 151-158, 159-167, 171-183, 185-187, 191-197, 557] may be cited as the "Labor Management Relations Act, 1947."

* * * * *

29 U.S.C. § 152(2) provides:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 USCS §§ 151-163, 181-188], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 1002(32) provides:

The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

29 U.S.C. § 1003 provides, in pertinent part:

(b) The provisions of this title shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 3(32) [29 USC § 1002(32)];

29 U.S.C. § 1132 provides, in pertinent part:

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of com-

petent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the Untied States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

WISCONSIN STATE STATUTES:

WISCONSIN STATUTE § 45.05 for the years 1961, 1963, 1989-1990 provides:

(1) Any city council, village, town or county board may by gift, purchase, contract or condemnation acquire property, real or personal, for the purpose of providing, furnishing, constructing, erecting, repairing, maintaining, or conducting a suitable memorial to the memory of former residents thereof who lost their lives in the military or naval service of the state or of the United States, or to commemorate and honor the deeds of persons, residents, thereof, or of the state or United States, who served the nation in any war, or other persons who rendered great state or national service, or to the memory of any president of the United States, or for a combination of any of such purposes, which are hereby declared to be public purposes.

(2) Such memorial shall be of such character as shall be determined by the governing body of such city, village, town or county, and without limitation because of enumeration, may comprise a public building, hospital, sanatorium, home for the aged or indigent, park, recreation facility, community forest or other suitable object having a public purpose.

(3) Any city council, town, village or county board may appropriate money and may levy a tax in order to acquire, pay for, construct, erect, furnish, equip, operate, repair, maintain or reconstruct a suitable memorial for the purpose or purposes provided in this section.

(4) Any city council or village, town or county board may authorize the use of any public property respectively of such city, village, town or county as a site for a memorial, and any county may authorize its public property to be so used by any city, village or town therein.

(5) Any city council, village, town or county board may by ordinance or contract provide for the management, control or operation of any memorial, and it may enter into a written lease, *for a term not exceeding 25 years*, with any duly chartered and incorporated veterans' organization established in said town, city or village, such lease to include provisions for the amount of rental and such conditions of public use as it may determine.

(6) Any county, city, village or town that has previously taken action toward the establishment of a monument or memorial under the statutes of 1943 or prior statutes may continue under such previously existing statutes or may proceed under this section. Emphasis added.

WISCONSIN STATUTE § 67.04 provides, in pertinent part:

(1) in this section:

(a) "Project" means the acquisition, leasing, planning, design, construction, development, extension, enlargement, renovation, rebuilding, repair or improvement of land, waters, property, highways, buildings, equipment or facilities.

(b) "Public purpose" means the performance of any power or duty of the issuing municipality.

(2) (a) Subject to the limitations specified in s. 67.03, any municipality may borrow money and issue bonds to finance any project undertaken for a public purpose.

* * * * *

(4) The legislature finds that contracting of debt under this chapter for any project constitutes a public purpose.

WISCONSIN STATUTE § 67.05 provides, in pertinent part:

(1) Initial Resolution by Governing Body. If any municipality seeks to issue a bond under s. 67.04, the governing body of the municipality shall, prior to the issuance of the bond, adopt a resolution that states the purpose for and maximum amount of the borrowing. . . .

* * * * *

WISCONSIN STATUTE § 67.12(12) provides, in pertinent part:

Borrowing on Promissory Notes. (a) Any municipality may issue promissory notes as evidence of indebtedness for any public purpose, as defined in S. 67.04(1)(b) including but not limited to paying any general and current municipal expense, and refunding any municipal obligations, including interest on them. Each note, plus interest, shall be repaid within 10 years after the original date of the note, except that note issued under s. 144.241 shall be repaid within 20 years after the date of completion of the treatment work project which they fund.

* * * * *

(e) Before any promissory note is issued under this subsection:

(1) The governing body of the municipality shall adopt and record a resolution specifying the purposes and the maximum amount of the note issued.

WISCONSIN STATUTE § 803.01(3)(a) provides:

> If a party to an action or proceeding is a minor, or if the court has reason to believe that a party is mentally incompetent to have charge of the party's affairs, the party shall appear by an attorney, by the general guardian of the party's property who may appear by attorney or by a guardian ad litem who may appear by an attorney. A guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of property, or where the general guardian fails to appear and act on behalf of the ward or incompetent, or where the interest of the minor or incompetent is adverse to that of the general guardian. Except as provided in s. 807.10, if the general guardian does appear and act and the interests of the general guardian are not adverse to the minor or incompetent, a guardian ad litem shall not be appointed. Except as provided in s. 879.23(4), where the interests of the minor or mentally incompetent person are represented by an attorney of record the court shall, except upon good cause stated in the record, appoint that attorney as the guardian ad litem.

WISCONSIN STATUTE § 807.01 provides, in pertinent part:

* * * * *

> (4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% of the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under §§ 814.04(4) and 815.05(8).

FEDERAL RULES OF APPELLATE PROCEDURE:

Federal Rule of Appellate Procedure 3 provides, in pertinent part:

* * * * *

(b) *Joint or Consolidated Appeals.* If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

* * * * *

(d) *Service of the Notice of Appeal.* The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

Fed. R. CIV. PROC. RULE 12(h)(3) provides:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shal dismiss the action.

FED. R. CIV. PROC. RULE 17(c) provides, in pertinent part:

> Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person.

* * * * *

FED. RULES OF EVIDENCE RULE 201 provides, in pertinent part:

> (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questions.
>
> (c) When discretionary. A court may take judicial notice, whether requested or not.
>
> (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

INTERNAL REVENUE CODE REGULATIONS:

INTERNAL REVENUE CODE § 501(c)(3) provides, in pertinent part:

List of exempt organizations.

* * * * *

(3) Corporation and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .

* * * * *